S. HRG. 112–915

EQUALITY AT WORK: THE EMPLOYMENT NON-DISCRIMINATION ACT

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

ON

EXAMINING EQUALITY AT WORK, INCLUDING S. 811, TO PROHIBIT EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION OR GENDER IDENTITY

JUNE 12, 2012

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C O N T E N T S

STATEMENTS

TUESDAY, JUNE 12, 2012

EQUALITY AT WORK: THE EMPLOYMENT NON-DISCRIMINATION ACT

TUESDAY, JUNE 12, 2012

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m. in room SD–106, Dirksen Senate Office Building, Hon. Tom Harkin, chairman of the committee, presiding.

Present: Senators Harkin, Murray, Casey, Merkley, Franken, and Bennet.

OPENING STATEMENT OF SENATOR HARKIN

The CHAIRMAN. The Senate Committee on Health, Education, Labor, and Pensions will come to order.

I want to welcome everyone today. In our committee today, we will hear testimony on a very important civil rights legislation, the Employment Non-Discrimination Act, also known as ENDA.

The issue here could not be simpler or more straightforward. It is long past time to eliminate bigotry in the workplace, and to ensure equal opportunity for all Americans. It is time to make clear that lesbian, gay, bisexual, and transgender Americans are first class citizens. They are full and welcome members of our American family, and they deserve the same civil rights protections as all other Americans.

The fact is, over the last 45 years, we have made great strides in America toward eliminating discrimination in the workplace. Our country is a far better place because of laws against discrimination in the workplace based on race, sex, national origin, religion, age, and disability, among others. It is time, at long last, for us to also prohibit discrimination on the basis of sexual orientation and gender identity. Such discrimination is wrong and should not be tolerated.

As we will hear today, many States and businesses are already leading the way by demonstrating that full equality is not only the right thing to do, but it benefits all. However, the harsh reality is that employers in most States can still fire, refuse to hire, or otherwise discriminate against individuals because of their sexual orientation or gender identity, and shockingly, they can do so within the law.

Too many hardworking Americans, whether employed by private companies or by public entities, are being judged not by their talent, their ability, and their qualifications, but by their sexual ori-

entation or gender identity. Too many of our fellow citizens are being judged not by what they can contribute to a company, but by who they are or whom they choose to love. Unfortunately, we can cite countless cases of bigotry and blatant job discrimination based on sexual orientation or gender identity. Decent, hardworking Americans are being hurt by discrimination every day.

Qualified workers should not be turned away or have to fear losing their livelihood for reasons that have nothing to do with their qualifications, their skills, or their performance. Such practices are un-American and they should not be permitted in our workplaces.

I want to publicly thank Senator Merkley, Senator Kirk, and many others for introducing a fully inclusive Employment Non-Discrimination Act.

This bill is not complex. It makes clear that private businesses, public employers, and labor unions cannot make employment decisions—hiring, firing, promotion, or compensation—because of a person's actual or perceived sexual orientation or gender identity. It contains exemptions for small businesses and religious organizations, and current rules applicable to the armed forces are not affected. The bill expressly prohibits disparate impact claims.

As we will hear today, this legislation follows in the footsteps of our existing civil rights laws. Just as debates leading to passage of those earlier civil rights bills, we are hearing claims today that ENDA will lead to a flood of lawsuits, or be an undue burden on religious organizations or businesses. I think these claims are baseless. Indeed, we are pleased to have broad bipartisan support for this bill, as well as the endorsement of civil rights organizations, countless businesses, and religious leaders.

We are talking about a fundamental American value, equal treatment for all, the principle that no citizen in our country should be discriminated against.

I am proud that in the last congress, this committee held a hearing on this important bill. We are doing so again today, and I look forward to working with all of my colleagues to advance this long overdue legislation.

I will leave the record open for a statement by Senator Enzi.

The CHAIRMAN. I want to recognize Senator Merkley, who is the lead sponsor of this bill. He has requested an opportunity for an opening statement, and since he is the lead sponsor, I will, thus, recognize him for that.

Senator Merkley.

STATEMENT OF SENATOR MERKLEY

Senator MERKLEY. Thank you. Thank you, Chairman Harkin.

I really appreciate your holding a hearing on this issue, which is so critical for LGBT Americans.

A big thanks, also, goes to my chief co-sponsor, Senator Kirk who, unfortunately, cannot be here with us today. I think we are all together in wishing him a speedy recovery. In his absence, I want to take a moment to note the tremendous leadership he has shown on these issues, both in the House of Representatives and now as a member of the U.S. Senate.

I also want to recognize the indispensable role that the late Senator Ted Kennedy played on this issue. It was an honor when he

asked me to step-in to continue to lead this fight. I have been pleased to do so over the last 4 years, and I hope that soon, in the future, we will be talking about this battle in a historical context having brought equality of opportunity to all Americans.

At its core, employment discrimination is a matter of fundamental fairness. Being able to make a living and do so without fear of discrimination goes right to the heart of life, liberty, and the pursuit of happiness. Unfortunately, the majority of our States have no protections against discrimination on the basis of sexual orientation or gender identity. At the same time, a very large percentage of LGBT Americans are discriminated against in the workplace, as you will hear from one of our witnesses today.

It is time to expand fundamental fairness to all Americans, and that is exactly what this bill does. Quite simply, ENDA extends the exact, same Federal protections that already exist for race, religion, sex, national origin, age, and disability. It is the fair thing to do. It is the right thing to do, and it is good for business as well.

Many employers have already endorsed this change. You will hear from one long time leader in the business community today, General Mills, about its support for these nondiscrimination policies. I look forward to that testimony.

In addition to the businesses represented here today, one of the largest employers in my home State of Oregon, Nike, has been a vocal proponent of this bill, and I would like to enter a few of their comments into the record. In their words, "ENDA is good for business, good for our employees, and our communities." They continue that inclusive, nondiscrimination policies,

> "Enable us to attract and retain the best and brightest people around the world. Why would we not want to do everything we can to help our businesses compete, especially when it also results in fair treatment, in equality, and in opportunity for our workers? It is a win-win."

This is not, nor should it be, a democratic or republican issue. I am thrilled to be joined by Senator Kirk on this bill, in addition to Senator Collins and Senator Snowe as sponsors, co-sponsors.

In Oregon, in 2007, I led the effort to put these protections into State law, and there are a lot of things that our red counties and our blue counties do not always agree on. But this is one issue where, from border to border, I hear the same thing: it is a matter of fundamental fairness. It is who we are as Americans.

And I can tell you that in over 140 town halls that I have held since becoming a Senator, I have never had a business member or a member of the religious community come to a town hall and say we did the wrong thing in expanding fairness and equality of opportunity in employment to all Oregonians. I think this same response will be true when we get this done for the United States of America as a whole.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Merkley.

Also, Senator Collins, who is not a member of the committee, asked if she could put a statement, in support of the bill. She is a lead sponsor, along with Senator Merkley and Senator Kirk. And so, I would ask that her statement be inserted at this point in the record.

[The information referred to follows:]

PREPARED STATEMENT OF SENATOR COLLINS

Mr. Chairman, I would like to thank you and Ranking Member Enzi for holding this hearing today on S. 811: the Employment Non-Discrimination Act. I am pleased to be an original cosponsor of this important legislation which will affirm the principle that individuals should be judged on their skills and abilities, and not by who they are.

All Americans deserve a fair opportunity to pursue the American dream. Over the years, we have rightly taken a stand against workplace discrimination based on race, sex, national origin, religion, age and disability. Today it is time for us to ensure that all workers are judged on their talents, abilities and capabilities free from prejudice by closing an important gap in Federal law.

The right to work is a fundamental one. How can we in good conscience deny that right to someone for no other reason than their sexual orientation or gender identity? Especially in today's economy, job security has taken on a renewed importance to all Americans. How can we tell one segment of Americans that they are not entitled to that security because of whom they love?

The concept is neither novel nor revolutionary. Much of corporate America has already embraced LGBT protections in order to take full advantage of the most talented employees. Some 86 percent of the Fortune 500 companies extend protections based on sexual orientation, and 50 percent extend protections based on gender identity.

In addition, our bill is similar to the current law in several States, including Maine.

But despite these advances, it still remains legal in 29 States to fire or refuse to hire someone for being lesbian, gay or bisexual. At too many companies, high-performing LGBT employees can be and are still openly discriminated against.

Mr. Chairman, I am proud to have been a champion of the Employment Non-Discrimination Act since 2002. It is a commonsense solution, consistent with existing Federal civil rights laws, that would not create an undue burden on American businesses. Moreover, it's the moral thing to do, the right thing to do, and the equitable thing to do.

Thank you for moving forward with this important legislation.

The CHAIRMAN. And now, we will go to our panel. We have a distinguished panel today. I will run through the introductions, and then we will go from left to right.

First is Dr. Lee Badgett, a research director at the Williams Institute for Sexual Orientation Law and Public Policy at UCLA, also the director of the Center for Public Policy and Administration at the University of Massachusetts Amherst, where she is a professor of economics.

Next, Mr. Kylar Broadus. Did I pronounce that right, Broadus? Broadus. Kylar Broadus is an attorney and associate professor of law at Lincoln University in Missouri. He is the founder of Trans People of Color Coalition.

Next, Mr. Sam Bagenstos, I think I have that right now, a professor of law at the University of Michigan Law School. He has served as a law clerk to Justice Ruth Bader Ginsburg and was on the faculty at Harvard Law School. Most recently served as the Principal Deputy Attorney General for Civil Rights in the Justice Department, the No. 2 official in the Civil Rights Division of the Justice Department.

Next, I am going to yield to my colleague from Minnesota for purposes of introduction.

Senator FRANKEN. Thank you, Mr. Chairman.

I am honored to have the opportunity to welcome Ken Charles. Mr. Charles is the vice president of Global Diversity and Inclusion for General Mills, where he has been employed since 2000. I am proud to say that General Mills has its roots in Minnesota that go back 150 years, and currently employs 35,000 Minnesotans.

Those workers, along with the other 2½ million people that show up to work every day in Minnesota, already have the legal protections that ENDA would extend to workers across the country, and everything seems to be fine.

Ken, I am so happy you could be here today to share with the committee how General Mills' policy of inclusion has contributed to your company's innovation and growth. An impressive 94 percent of your employees say that General Mills provides a working environment that is accepting of differences in background and lifestyle. I grew up a couple of miles from the campus, from your headquarters and the beautiful campus. I always admired it and enjoy, as you know, Cheerios and Wheaties.

I have had the opportunity to visit many of your workers in Minnesota, and it is apparent that General Mills makes their well-being a top priority. General Mills can serve as a model for every company. It is days like today that I am particularly proud to be a Minnesotan.

Thank you, again, for your testimony at today's hearing.

Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Franken.

Then we have Mr. Craig Parshall. Mr. Parshall is senior vice president and general counsel of the National Religious Broadcasters Association. He is an attorney and has practiced First Amendment law and employment law, representing clients in, among other courts, the Supreme Court. I just recognized, Mr. Parshall, this is your second appearance here. He was at our last hearing 2 years ago, and we welcome you back.

With that, I will just say that all of your statements, which I read last night, are very good, and I will ask permission that they all be inserted in the record in their entirety.

We will go from left to right. If you could sum up in 5 to 7 minutes, then we can get into a discussion, I would appreciate it.

Ms. Badgett, we will start with you. Welcome, and please proceed.

STATEMENT OF M.V. LEE BADGETT, RESEARCH DIRECTOR OF THE WILLIAMS INSTITUTE FOR SEXUAL ORIENTATION LAW AND PUBLIC POLICY AT UCLA, AND DIRECTOR OF THE CENTER FOR PUBLIC POLICY AND ADMINISTRATION AT THE UNIVERSITY OF MASSACHUSETTS AMHERST, AMHERST, MA

Ms. BADGETT. Good morning, Senator Harkin and members of the committee.

Today I will just summarize three basic points in my written testimony that will document the need for the Employment Non-Discrimination Act.

My first point is that employment discrimination against lesbian, gay, bisexual, and transgender Americans, whom I'll just call LGBT Americans, occurs in workplaces all across the country.

Jacqueline Gill was a temporary instructor at a community college in Texas. She is also a lesbian. When permanent jobs opened up in 2010, she was not allowed to interview for those positions even though she had received praise from students, from her colleagues, and from parents of her students.

Several of her colleagues, who were equally qualified, or actually less qualified, were allowed to interview and were hired whereas Ms. Gill was not. She was also harassed because of her sexual orientation. Her supervisor told her at one point that Texas and Tarrant County do not like homosexuals.

Vandy Beth Glenn was fired in 2007 from her job with the Georgia General Assembly because she is transgender. Before he fired her, Glenn's direct supervisor told her that her gender expression was unnatural and unsettling, and he later fired her on the grounds that her gender transition was inappropriate and would make other workers there feel uncomfortable.

Ronald Crump is a gay man who was a Los Angeles police department sergeant. His supervisor verbally harassed him on a number of occasions because Crump is gay, comparing him to one of the women in the department, "Minus the heels," and other derogatory comments. When Crump filed an internal complaint, he was transferred from a very prestigious position to a much less favorable one.

We now have decades of social science research that tell us that those stories, which are just a sample of many, are repeated in workplaces all across America. In 2008, the General Social Survey found that 42 percent of lesbian, gay, and bisexual people had experienced employment discrimination because of their sexual orientation at some point in their lives, and 27 percent of those had actually experienced that just in the last 5 years. So it is common and it is recent.

In the largest survey of transgender people to date, 47 percent of respondents had experienced discrimination in hiring and promotion or in job retention.

In 2008, my colleagues and I studied the complaints filed by LGB people in the States that outlaw sexual orientation discrimination. I will just say the numbers of those complaints were actually relatively small compared to the overall numbers of complaints filed at those State agencies each year. But when we adjusted those counts to take into account the different population sizes of the protected groups, what we found was that lesbian, gay, and bisexual

people file complaints at roughly the same rate that women and people of color do suggesting that discrimination is roughly similar in terms of its frequency.

Two recent studies actually provide a very vivid picture of discrimination. Sociologist Andras Tilcsik sent out pairs of resumés of recent college graduates for job openings for white collar entry level positions in seven different States. He coded one of the resumes as gay by saying that this person had been the treasurer of the campus gay organization, and the other one he left as just a volunteer position at some other non-gay organization. He sent them both out to the employers, and the differential treatment of the gay applicants was very clear. To just give you a perspective on that, to get an interview for a job a gay applicant had to apply for 14 jobs, whereas the heterosexual applicant only had to apply for 9 jobs to get an interview.

Another study sent actual applicants, one transgender and one non-transgender, to apply for 24 jobs in the retail sector in New York City. In half of those jobs, 12 out of 24, half of those employers, the non-transgender applicant actually got a job offer, and only 2 of those 24 employers did the transgender applicant receive a job offer, and that is a very high degree of discrimination.

Two decades of research also suggested this kind of discrimination has important economic harms, in particular, for gay and bisexual men. Depending on the study, gay and bisexual men earn from 10 percent to 33 percent less than similarly qualified heterosexual men, most likely because of discrimination. Transgender people also have very low incomes. The National Transgender Survey found that 15 percent of their respondents had incomes under $10,000 per year, and that is a very low income; 15 percent of the transgender respondents, whereas in the population as a whole, it is only about 4 percent with such low incomes.

The last thing I will say about the evidence of discrimination is that it includes both private sector employees and employees of State and local governments. My Williams Institute colleagues have found exactly the same widespread and persistent pattern of discrimination against LGBT people who work for State governments as we see for private sector employers.

My next two points I will make much more briefly. The second one is that non-discrimination laws like ENDA are likely to reduce discrimination. Some of this recent research suggests that both a pay grab shrink and the differential treatment of gay applicants is less in States that have such laws, so that makes me think that ENDA could play a very important role in reducing that discrimination as well.

My third and last point, that I know you will hear more about, is that the evidence shows the employers would also benefit if ENDA were passed. It is not just the LGBT employees. We have long known that businesses are most successful when they recruit, hire, and retain employees based on what they can do, not who they are, as Senator Harkin mentioned. That is one reason why 86 percent of Fortune 500 companies have bans on sexual orientation discrimination and half of the Fortune 500 now have a policy of nondiscrimination based on gender identity.

And studies also suggest that ENDA will lead to healthier and more productive workers if they have legal protection from discrimination.

So just to sum up very briefly, the research overwhelmingly demonstrates both the Employment Non-Discrimination Act is necessary in order to fight discrimination, and would benefit both employees and employers.

Thank you.

[The prepared statement of Ms. Badgett follows:]

PREPARED STATEMENT OF M.V. LEE BADGETT

SUMMARY

S. 811, the Employment Non-Discrimination Act, would outlaw discrimination in hiring and other employment decisions based on sexual orientation and gender identity. I will use recent and ongoing research to document the clear need for this legislation.

First, several decades of social science research have demonstrated that employment discrimination against lesbian, gay, bisexual, and transgender (LGBT) Americans occurs in workplaces all across the country. This evidence comes from many different methods of studying discrimination, including self-reported experiences, official complaints of discrimination in States that already ban it, experiments to measure the treatment of LGBT job applicants, and comparisons of wages earned by LGBT people and heterosexual people. The evidence includes discrimination in both private sector employment and public employment in State and local governments.

Second, nondiscrimination laws like ENDA are likely to reduce discrimination. Some recent evidence suggests that State laws banning discrimination have been effective in reducing wage gaps and employment discrimination against LGB people, in particular.

Third, evidence suggests that employers would also benefit if ENDA were passed, since LGBT workers will be healthier and more productive workers if they have legal protection from discrimination.

Good morning, Senator Harkin and members of the committee. I am an economist and director of the Center for Public Policy and Administration at the University of Massachusetts Amherst, and I'm also the research director of the Williams Institute on Sexual Orientation Law and Public Policy at UCLA. I have studied employment discrimination based on sexual orientation, race, and gender for more than 20 years and have published two books and numerous studies on this topic.

Today I am here to speak to you about S. 811, the Employment Non-Discrimination Act of 2011. As you know, this bill would outlaw discrimination in hiring and other employment decisions based on sexual orientation and gender identity. I will use recent and ongoing research to make three main points to document the clear need for this legislation.

First, several decades of social science research have demonstrated that employment discrimination against lesbian, gay, bisexual, and transgender (LGBT) Americans occurs in workplaces all across the country. This evidence comes from many different methods of studying discrimination, including self-reported experiences on surveys, official complaints of discrimination in States that already ban it, experiments to measure the treatment of LGBT job applicants, and comparisons of wages earned by LGBT people and heterosexual people. Together these sources provide ample evidence that employment discrimination based on sexual orientation and gender identity is a serious problem in the United States.

For several decades, academic researchers have surveyed LGBT people about their workplace experiences. Those surveys reveal numerous experiences of being fired, being denied a job, or some other form of unequal treatment in the workforce that stemmed from these individuals' sexual orientation or gender identity. Most recently, the 2008 General Social Survey found that 42 percent of a national random sample of lesbian, gay, and bisexual people had experienced at least one form of employment discrimination because of their sexual orientation at some point in their lives. In addition 27 percent had experienced employment discrimination during the 5 years prior to the survey. That figure includes both employees who have disclosed their sexual orientation in the workplace and those who have not.

Findings from recent surveys of transgender employees confirm similar and even more common experiences of discrimination. For example, in the largest survey of transgender people to date, 78 percent of respondents reported experiencing at least one form of harassment or mistreatment at work because of their gender identity. More specifically, 47 percent had been discriminated against in hiring, promotion, or job retention.

A different source of data supports the finding that discrimination based on sexual orientation is common, and perhaps as common as other kinds of discrimination, relative to population size. My colleagues and I collected the numbers of sexual orientation discrimination complaints in States that outlawed such treatment from 1999–2007. The number of complaints in each State is relatively small compared with the overall level of complaints filed at State agencies. But once we adjust for the population size of the different protected groups, we see that LGB people are as likely to file complaints as women and people of color. The annual rate of complaints was 4.7 per 10,000 LGB people on average in these States (assuming that LGB people are 4.1 percent of the U.S. population). That figure is quite similar to the number of sex discrimination complaints per woman (5.4 per 10,000 women) and race-related complaints per person of color (6.5 per 10,000). In other words, LGB people are about as likely to file discrimination complaints as are people in groups that are currently protected against discrimination under Federal law.

We see particularly compelling evidence of discrimination in two recent studies that tested employers' responses to a pair of identically qualified applicants differing only by sexual orientation or gender identity. Sociologist Andras Tilcsik sent out pairs of fictional resumés in response to ads for entry-level positions in seven States, with one resumé indicating volunteer work as treasurer of a gay campus organization and the other including volunteer work at a non-gay organization. The differential treatment of gay applicants was clear. Of the gay-coded applicants, only 7.2 percent were offered an interview, while 11.5 percent of the non-gay-coded applicants were invited to an interview. To get a job interview, a gay applicant had to apply to 14 jobs, while the average heterosexual applicant only had to apply for 9 jobs to get an interview.

Another study sent pairs of actual applicants, one transgender and one not, to apply for jobs in the retail sector in New York City. In 11 out of 24 applications (46 percent), the non-transgender applicant but not the transgender applicant received a job offer. Only 1 out of 24 (4 percent) resulted in the transgender applicant being offered the job while the non-transgender applicant was not—a 42 percent net rate of discrimination.

An additional way that economists and sociologists look for evidence of discrimination is to compare the earnings of people who have different personal characteristics, such as sexual orientation, but the same productive characteristics. If there is a wage difference after controlling for all of the factors that we reasonably expect to influence wages, such as education and experience, then most of us would conclude that discrimination is likely the reason for the wage gap for the disadvantaged group.

Across two decades of research, studies show a significant pay gap for gay or bisexual men when compared to heterosexual men who have the same productive characteristics. Depending on the study, gay and bisexual men earn from 10 percent to 32 percent less than similarly qualified heterosexual men. Lesbians generally earn the same as or more than heterosexual women, but lesbians earn less than either heterosexual or gay men. We have no comparable studies for gender identity, but the National Transgender Discrimination Survey found that 15 percent of respondents had incomes under $10,000 per year, while the general population figure for that income level was 4 percent at the time of the survey.

Also, it's important to note that the evidence of discrimination discussed here includes both private sector employees and employees of State and local governments. When my Williams Institute colleagues compared reports of discrimination, complaints of discrimination, and the wage impact of discrimination between the public and private sector, they found the same patterns of employment discrimination against LGBT people who work for State governments and for private sector employers. Based on this research, they concluded that there has been a widespread and persistent pattern of discrimination by State governments as well as in the private sector.

Overall, there is extensive evidence of discrimination against LGBT people, as well as evidence that sexual orientation discrimination results in economic harm to LGBT people, reducing their earnings by thousands of dollars.

The studies showing wage gaps also lead to my second major point: Discrimination hurts, but nondiscrimination laws like ENDA are likely to reduce discrimination. Some recent evidence suggests that State laws banning discrimination have

been effective in reducing wage gaps and employment discrimination against LGB people, in particular. Two recent studies using Census 2000 data found that State-level sexual orientation nondiscrimination laws reduced the gap in annual earnings for gay men. In the study referred to earlier that found differential treatment of gay male job applicants, the gap in treatment was significantly smaller in States or local areas with nondiscrimination laws that included sexual orientation—8.7 percent received invitations compared with 5.3 percent in States without such protections—although the non-gay applicants were still favored in both sets of States.

My third and final point is that America's businesses are also likely hurt by the direct and indirect effects of discrimination in the workplace. Economists and businesses have long argued that businesses will be most successful when they recruit, hire, and retain employees on the basis of talent, not personal characteristics that have no impact on an employee's ability to perform a job well. Beyond that most basic reason to forbid discrimination, the evidence suggests that employers would also gain in other ways if ENDA were passed. Numerous studies from various academic disciplines suggest that LGBT workers will be healthier and more productive workers if they have legal protection from discrimination.

A key link between policies and productivity is disclosure of one's sexual orientation. Many studies have demonstrated that fear of discrimination keeps LGB workers, in particular from revealing their sexual orientation in the workplace. Although having experienced discrimination directly is a powerful reason for some to "stay in the closet," many studies show that LGB people who fear discrimination are also less likely to reveal their sexual orientation to co-workers and supervisors.

Employers have a stake in these individual decisions, since disclosure has potentially positive benefits to LGB workers' well-being and job performance. Studies find that people who have come out report lower levels of anxiety, less conflict between work and personal life, greater job satisfaction, more sharing of employers' goals, higher levels of satisfaction with their co-workers, more self-esteem, and better physical health. So when fear of discrimination causes LGB employees to conceal their sexual orientation or gender identity, employers experience negative costs along with LGB people themselves. The time as well as social and psychological energy that is required to maintain a hidden identity would, from an employer's perspective, be better used on the job.

As in the case of wage gaps, nondiscrimination policies can improve the workplace climate and influence choices about disclosure and concealment. Several studies have found higher levels of disclosure in workplaces when employers have their own non-discrimination policies that include sexual orientation. And one study found that LGB people who live in places covered by a nondiscrimination law had higher levels of disclosure than those in unprotected locations.

Perhaps the best evidence that nondiscrimination policies are good for business comes from the fact that many companies have voluntarily adopted policies and point to the business value of those policies. According to the Human Rights Campaign®, 86 percent of the Fortune 500 companies include sexual orientation in their nondiscrimination policies, and 50 percent include gender identity. A Williams Institute study shows that large companies report that they adopt these policies to improve employee retention, recruitment, and productivity, as well as to generate the best ideas and a stronger customer base.

To sum up, several decades of research demonstrate that discrimination based on sexual orientation and gender identity exists in our Nation's workplaces. This discrimination hurts LGBT people financially and in other harmful ways. Our Nation's employers and employees would be better off with an LGBT workforce that no longer fears discrimination. The research overwhelmingly demonstrates that passing the Employment Non-Discrimination Act would benefit both employees and employers.

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The CHAIRMAN. Thank you very much, Dr. Badgett.

Now we turn to Mr. Kylar Broadus. I will get it right one of these times.

Mr. BROADUS. Thank you, Senator.

The CHAIRMAN. Thank you for being here. Please proceed.

STATEMENT OF KYLAR W. BROADUS, FOUNDER, TRANS PEOPLE OF COLOR COALITION, COLUMBIA, MO

Mr. BROADUS. Mr. Chairman and members of the committee, I am very honored to be here today.

As mentioned, I am the executive director of Trans People of Color Coalition, and I do various things. I reside in Columbia, MO and I am a native of mid-Missouri. I also teach at an historically Black college, and I am here to obviously speak in support of inclusion of ENDA. And I am here to paint a little bit different picture than just the statistics, although the statistics are very important, but as a person that has suffered job discrimination himself.

I am a transgender American. I am a female to male transsexual person that transitioned approximately 20 years ago. The terminology is explained in my testimony. Basically, there is an umbrella term called "transgendered," that is used to define people whose internal identification is different from their external appearance at birth, and that would be me.

For me, the physical transition was more about letting the outer world know who I really was. My internal sense of self has never changed and I knew who I was internally. People have always related to me as male. That is my essence and my soul. The transition was a matter of actually living the truth and sharing the truth with the world rather than living a lie every day and pretending to be somebody that I was not.

Prior to any actual medical transition, just to give you a sort of picture of my life. When I navigated the world, even though my driver's license had "female" on it, nobody ever saw that. When I would go in to do anything, they would always relate to me as male, and never understood why I had a female gender marker. So obviously, it was tough to navigate security. It was tough to navigate employment where you have to have matching documentation for your employer.

And then, also the fact that some people were uncomfortable because I did not choose one box or the other, or fit in one box very clearly; again, not my choice, but just who I was and am.

When I used female restrooms, police would accost me. I would have to strip and then they would still tell me, "Sir, get out of the bathroom," when I would use a ladies' room. It is just humiliating and dehumanizing, to say the least.

So after years of having to navigate these issues, I just chose to go with what was natural for me, and again, bring my full self to the table, and to the world to show the world who I am and the real me.

At work, when I decided to actually transition, I had been there for a number of years and I am a workaholic, and it was disheartening to me that all this could be pulled out from under me because people were uncomfortable with the person that I am.

While studying business in college, I assumed like most students, that I would not encounter any of these difficulties. I was a good person. I was a mid-Missourian raised with a strong work ethic, both parents who put us first as their children, and who worked multiple jobs to maintain a livelihood for their family. I recall my first job at 5-years-old, which I got spending money and that is how we earned our allowance by working with our parents at their evening jobs, and was so proud, and am a proud person to have that so strong work ethic.

Prior also to the physical transition, I was working in the financial industry, which is actually a high paying industry. But again, when I shifted or transitioned, that is when all the trouble began. It was and still is emotional to me because it impacted me emotionally. I suffer from posttraumatic stress as a result of the harassment that I encountered in the workplace from my employer, from not being allowed to change my name or use the name I used, not being allowed to wear my hair a certain way, not being allowed to dress as me. All these things physically impacted me and I had, and still suffer from posttraumatic stress and several other things as a result of this.

Not only that, but I was then unemployed, and to be unemployed is very devastating, also demeaning and demoralizing. And then the recovery time, there is no limit on it. I still have not financially recovered.

I am underemployed. When I do talks, I tell people I am not employable. I was lucky to be where I am, and I am happy to be where I am, but I am one of the fortunate people that is employed. There are many more people like me that are not employed as a result of just being who they are. Being good workers, but being a transgender or transsexual.

So I think it is extremely important that this bill be passed to protect workers like me. There are many cases that I hear every day, people call me every day with these cases around the country because I am also an attorney that practices and deals with people that suffer employment discrimination.

The last thing I will say, wrapping up, because I do think I am out of time is that it is, again, I cannot emphasize this enough as I still sit here today with almost tears in my eyes, it is devastating, it is demoralizing, and dehumanizing to be put in that position.

So I urge this committee particularly to always include transgender people because I know that had been an issue in this bill at some point as we suffer grave discrimination as some of the statistics show. Most of us, again, make less than $10,000 a year who are able to be employed. And if we are not, then we have to resort to other means to survive and live, which then make our lives even worse.

So I thank this committee for allowing me this time to speak. I thank you for considering this, and again, I strongly urge the U.S. Congress to take this bill up and pass the ENDA, the Employment Non-Discrimination Act.

[The prepared statement of Mr. Broadus follows:]

PREPARED STATEMENT OF KYLAR W. BROADUS

Mr. Chairman and members of the committee, my name is Kylar William Broadus and I'm the executive director of the Trans People of Color Coalition, a 2-year-old national organization formed to focus on the concerns of transgender people of color in America. I reside in Columbia, MO and am a native mid-Missourian. I teach at a historically Black college, Lincoln University, and practice law. Today, I'm here to talk to you about S. 811, the Employment Nondiscrimination Act (ENDA) and the need for inclusion of employment protections for transgender Americans. I am thankful to you for the opportunity to be here to speak in favor of this legislation.

I am a transgender American, a female to male transsexual that transitioned approximately 20 years ago. For those not familiar with the term "transgender," it is used to define people whose internal identification as female or male does not match their assigned sex at birth, which includes many that undertake the medical process of changing their physical gender. The terms "trans" and "transgender" are used interchangeably. For me, the physical transition was about letting the outer world know my internal sense of self, of who really was inside this body. People always related to me as male from an early age and this continued, of course, into transition. My transition was a matter of living the truth and sharing that truth for the first time in my life.

Prior to actual medical intervention, as I indicated, I was mostly viewed as male. My gender assigned at birth was female, so my driver's license and other documents carried the gender marker of "female" even though my appearance was masculine. In some cases, I couldn't use female restrooms or locker rooms. When I used female restrooms security or police were called to escort me from the restrooms even after stripping to "prove" that I was female. That was humiliating and dehumanizing. After years of not being able to use the public restroom, I began to just use the men's room, where I never had any problems. I had the same problem with the women's locker room at the gym. One of my favorite memories is my girlfriend first going in to tell everyone that I wasn't a "man." Then I would walk in and all the women would run out of the locker room screaming "it's" a "man!" I would just change before going to the gym and remove my sweats in the gym area to avoid any problems.

I'm mainly here today to talk about my experience with workplace discrimination. First, I'll share my personal story and then talk about the plight of thousands of transgender Americans that are just getting their stories told.

While studying business in college, I assumed, like most students, that I would not encounter any special difficulties. I was raised in a working class family with a hard work ethic. I had my first job at the age of five working for my father at his evening job. He would take me and my sister to work with him and this was how we earned our spending money. I recall very vividly cleaning the water fountains in the offices. It was during this time that I learned to take pride in my work. My father showed me how to make the water fountains clean and shiny. I then graduated to the trash cans. From that point on, I have always worked a job and since college, two jobs at a time in some form or fashion. My employers have always praised my work.

Prior to my physical transition, I began working at a major financial institution. I wore the traditional female attire at the time, which was a skirt and pantyhose. It was required and expected in the late 1980s and early 1990s. As I began to find myself, my attire gradually shifted from feminine to more masculine styles. Then I actually moved to a division of the company where the dress code was less stringent and began to wear men's suits and ties most of the time. My hair got shorter

and more masculine. My demeanor had always been masculine. Many clients already confused me for male even though my name was female. My coworkers didn't seem to mind. It was management that seemed to have issues with it. I was called in to discuss my hair cut, and I was told that I was not allowed to go by my initials, "K.B.," which many males did but females didn't.

After I announced my gender transition, it only took 6 months before I was "constructively discharged" from my employer. While my supervisors could tolerate a somewhat masculine-appearing black woman, they were not prepared to deal with my transition to being a black man. With growing despair, I watched my professional connections, support, and goodwill evaporate, along with my prospects of remaining employed. I was harassed until I was forced to leave. I received harassing telephone calls hourly from my supervisor some days. I received assignments after hours that were due by 9 a.m. the next morning. The stress was overwhelming. I ended up taking a stress leave for several weeks. I thought upon my return perhaps things would settle down. I was back less than a week from stress leave and knew that it wasn't going to settle down. I was forbidden from talking to certain people and my activities were heavily monitored. I was forced out and unemployed for about a year before finally obtaining full-time employment.

Before fully accepting that new reality, however, I tried everything possible to save the career I had worked so many years to build. Once I lost my job, I thought that there MUST be laws that protect individuals when they are discriminated against. After filing a lawsuit in Federal court, though, I learned quickly that transgender people weren't covered under any discrimination laws. Like the vast majority of plaintiffs during my era, I lost. My lawsuit was summarily dismissed.

After my COBRA ran out, I had no health insurance and wasn't able to earn a living wage. I did what I could to juggle things including using my 401K. Even once I obtained employment I wasn't able to catch back up on everything that I had gotten behind on. I was working in positions that paid substantially less than I made. I went from financial services to part-time academia and a law practice in a region not very welcoming for a black transgender man in mid-Missouri. It has been well over 15 years since I lost employment and I still haven't recovered financially. My student loans were the most impacted and more than quadrupled since I left law school. My father is deceased but I care for my infirm mother and my underemployment makes it extremely difficult to do. Emotionally, I still suffer from post-traumatic stress syndrome from the discrimination I experienced.

Many transgender Americans suffer without protection and are subject to discriminatory practices. This is why it is extremely imperative that ENDA be passed. There are only 16 States and the District of Columbia that provide us protection from being discriminated against on the job just because of who we are. In the recent report "Injustice at Every Turn: A Report of the National Transgender Discrimination Survey," there were 6,450 transgender study participants from across the United States. The results were staggering across the board but particularly in the area of employment.

The report showed the following:

- Transgender respondents experienced unemployment at twice the rate of the general population with rates for transgender people of color up to four times the national unemployment rate.
- Ninety percent (90 percent) of those surveyed reported experiencing harassment or discrimination on the job or took actions like hiding who they are to avoid it.
- Forty-seven percent (47 percent) had experienced an adverse job outcome, such as being fired, not hired or denied a promotion because of being transgender or gender non-conforming.
- Over one-quarter (26 percent) had lost a job due to being transgender or gender non-conforming and 50 percent were harassed.
- Large majorities attempted to avoid discrimination by hiding their gender or gender transition (71 percent) or delaying their gender transition (57 percent).
- The vast majority (78 percent) of those who transitioned from one gender to the other reported that they felt more comfortable at work and their job performance improved, despite high levels of mistreatment.
- Overall, 16 percent said they had been compelled to work in the underground economy for income (such as doing sex work or selling drugs).
- Respondents who were unemployed or had lost a job due to bias also experienced ruinous consequences such as four times the rate of homelessness, 70 percent more current drinking or misuse of drugs to cope with mistreatment, 85 percent more incarceration, more than double the rate working in the underground economy, and more than double the HIV infection rate.

These results are staggering and make the case that there needs to be clear protection for transgender Americans who deserve the same chance at earning a living and providing for themselves and the people they love. It is imperative that Congress pass the Employment Non-Discrimination Act so that transgender people like me are able to live our lives and provide for our families without fear of discrimination.

I truly appreciate the opportunity to testify before you here today.

Thank you.

The CHAIRMAN. Mr. Broadus, thank you very much.

I am told by my staff that you are, indeed, the first transgendered individual to ever testify before the U.S. Senate. I am proud of this committee. I am proud of the people in this committee that would invite you here, and as chairman, I thank you for being here. And I want to commend you for your courage in being here and for being who you are because you are going to give courage to a lot of other people. So I commend you for that. Thank you very much for being here.

Mr. BROADUS. Thank you, sir.

The CHAIRMAN. Now, let us turn to Mr. Bagenstos, and welcome, and please proceed.

STATEMENT OF SAMUEL R. BAGENSTOS, PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN LAW SCHOOL, ANN ARBOR, MI

Mr. BAGENSTOS. Thank you, Chairman Harkin and members of the committee. I appreciate the invitation to testify today in support of this important bill.

My testimony today is based on my experience writing about, teaching about, litigating civil rights employment discrimination cases for most of the past 2 decades, including two stints in the U.S. Department of Justice, most recently from 2009 to 2011 where I did serve as the Principal Deputy Assistant Attorney General for Civil Rights.

The Employment Non-Discrimination Act is an exceptionally important bill. It is very much needed. It will be the logical next step in our Nation's commitment to eradicating workplace discrimination.

I want to talk about three things.

First, very briefly, the discrimination against lesbian, gay, bisexual, and transgender individuals is a serious problem, and we have heard that. Second, that the current legal regime in the States and the Federal Government is inadequate to deal with that problem. And third, that the Employment Non-Discrimination Act is an appropriately tailored remedy for that problem. And I am, of course, happy to answer any of the committee's questions.

As to the first point, I think everything that needs to be said, almost, about the harm, and impact, and extent of discrimination against lesbian, gay, transgender, and bisexual individuals has been said by the two witnesses who preceded me on this committee, and it is very difficult to add to that. All I will say is that at the most fundamental level, as Senator Merkley and Chairman Harkin, you suggested, workplace discrimination against people who are gay or lesbian, who are bisexual or transgender violate basic American values of equality, opportunity, and fair play. If a person can do the job and can do it as well as, or better, than anyone else, then an employer has no business firing that person or

refusing to hire that person simply because he or she is gay, lesbian, bisexual, or transgender. I think that is a basic principle.

When employers discriminate against LGBT individuals, they face a really tragic choice as we have just heard. But the cost is not just LGBT individuals, it is to our economy. It is to our society as a whole. That is why, I think, you are going to hear that 87 percent of Fortune 500 companies include sexual orientation in their antidiscrimination policies, and 41 percent, a number that has been growing steadily, include gender identity. That is because these companies recognize that their businesses will be more competitive when they hire all talented individuals.

But unfortunately, despite the policies of these forward-looking employers, discrimination against lesbian, gay, bisexual, and transgender individuals is widespread and these widespread harms demand a response, but the current law is inadequate to the task. There is a patchwork of State laws that address discrimination against lesbian, gay, and bisexual, and sometimes transgender individuals, but those laws cover only 16 States for all LGBT individuals and 21 States for lesbian, gay, and bisexual individuals. The gaps in their coverage are very significant, as I talk about in my written testimony.

Although some Federal courts and the EEOC have interpreted over the past 10 years Title VII of the Civil Rights Act as addressing parts of this problem, the law under that statute remains uncertain and developing. What we need is a clear Federal prohibition of discrimination against LGBT individuals, and that is what the Employment Non-Discrimination Act would accomplish.

ENDA would respond to these problems by doing nothing more than extending the sexual orientation and gender identity discrimination, the same basic legal structure that this country has applied for nearly 50 years, to other forms of employment discrimination. The bill takes its operative provisions directly from the operative revisions of title VII and the experience that employers have developed over the past 5 decades in complying with those provisions, the case law the courts have developed. The guidance the EEOC has provided will inform, and guide, and ease compliance with ENDA.

One of the title VII provisions that ENDA incorporates is one that, I know, has garnered a great deal of discussion in the past on this committee and elsewhere, and that is the statute's religious exemption. Section 6 of ENDA plainly states that the statute shall not apply to an organization that is exempt from the religious discrimination provisions of title VII. And section 6 specifically refers to the two provisions of title VII that create religious exemptions, section 702(a) and 703(e)(2).

Section 702(a)—these are very broad—section 702(a) exempts any, "Religious corporation, association, educational institution, or society," in anything relating to its activities. And section 703(e)(2) exempts any school, college, university or other educational institution or institution of learning that,

> "Is in whole or in substantial part owned, supported, controlled, or managed by a particular religion, or by a particular religious corporation, et cetera, or if the curriculum of that

school is directed toward the propagation of a particular religion."

These exemptions have been well-settled for decades and they have been upheld as constitutional by the Supreme Court. This bill would incorporate those exemptions in exactly a very clear and broad form.

The bill before this committee, as Chairman Harkin pointed out, also contains a number of limitations that sharply restrict the burdens it would impose on employers making it even narrower than title VII, notably, not having any disparate impact claims. And the bill bars quotas and other preferential treatment which, again, narrows the burden that it will place on employers.

I want to thank you, Chairman Harkin, and the committee, again, for the opportunity to testify in support of this very important bill. I very much look forward to answering the committee's question.

[The prepared statement of Mr. Bagenstos follows:]

PREPARED STATEMENT OF SAMUEL R. BAGENSTOS

Chairman Harkin, Ranking Member Enzi, and members of the committee, thank you for inviting me to testify today in support of the Employment Non-Discrimination Act. My name is Samuel Bagenstos. I hold an appointment as Professor of Law at the University of Michigan Law School. For most of the past two decades, I have taught, written about, and litigated cases in civil rights and employment discrimination law. From 1994 to 1997, and again from 2009 to 2011, I served in the U.S. Department of Justice, where I most recently was the Principal Deputy Assistant Attorney General for Civil Rights.

ENDA is an exceptionally important bill and one that is much needed. It will be the logical next step in our Nation's commitment to eradicating workplace discrimination. In this testimony, I will make three essential points: first, that discrimination against lesbian, gay, bisexual, and transgender individuals is a serious problem; second, that the current legal regime is inadequate to respond to that problem; and, third, that ENDA is an appropriately tailored remedy for that problem.

DISCRIMINATION AGAINST LGBT INDIVIDUALS IS A SERIOUS PROBLEM

LGBT individuals who have experienced discrimination have testified before this committee in the past, and the committee will hear more of their stories today. Their testimony stands on its own and provides the most compelling reason Congress should adopt this bill. Let me offer a wider scale view on why discrimination against LGBT individuals is wrong and why Congress should do something about it.

At the most fundamental level, workplace discrimination against people who are gay or lesbian or bisexual or transgender violates the basic American values of equal opportunity and fair play. If a person can do the job—and can do it as well as, or better than, anyone else—an employer has no business firing or refusing to hire that person simply because he or she is gay, lesbian, bisexual, or transgender. When employers discriminate against LGBT individuals, those individuals confront a choice that can be tragic: give up job opportunities in their chosen field—opportunities to perform jobs that they can do as well as or better than anyone else—or try to hide who they are, at great psychological cost and fear of discovery. An array of medical, psychological, and social scientific evidence demonstrates that the experience of workplace discrimination and stigma harms the mental and even physical health of lesbian, gay, bisexual, and transgender persons.[1] And the testimony this committee has heard from individuals who have experienced discrimination because of their sexual orientation or gender identity highlights the very substantial costs that discrimination imposes on those individuals.

[1] See Jennifer C. Pizer, Brad Sears, Christy Mallory & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 738–42 (2012).

But the cost is not just to LGBT individuals. When productive workers are denied the opportunity to perform their jobs, all of society loses out. In our current economic crisis, we don't have a person to lose. This is why 87 percent of Fortune 500 companies include sexual orientation in their nondiscrimination policies, and 41 percent include gender identity. They recognize that their businesses will be more competitive when they hire all talented individuals—and that, in the words of an official at one major company, "our people can serve our clients best when they can be authentic in the workplace."[2]

Unfortunately, despite the policies of forward-thinking employers like these, discrimination against lesbian, gay, bisexual, and transgender individuals is widespread. A review of the evidence, published just this Spring, found, among other things, that:

1. "LGBT people and their heterosexual coworkers consistently report having experienced or witnessed discrimination based on sexual orientation or gender identity in the workplace";
2. A national survey of gays and lesbians in 2008 found that "37 percent had experienced workplace harassment in the last 5 years, and 12 percent had lost a job because of their sexual orientation";
3. A 2011 survey of transgender people found that 90 percent had "experienced harassment or mistreatment at work, or had taken actions to avoid it, and 47 percent [had] been discriminated against in hiring, promotion, or job retention because of their gender identity";
4. "Numerous reports of employment discrimination against LGBT people [appear] in court cases, State and local administrative complaints, complaints to community-based organizations, academic journals, newspapers and other media, and books"; and
5. "State and local governments and courts have acknowledged that LGBT people have faced widespread discrimination in employment."[3]

CURRENT LAWS ARE INADEQUATE

These widespread harms demand a response. Unfortunately, current law is inadequate to the task. Although a patchwork of State statutes address discrimination against lesbian, gay, and bisexual—and sometimes transgender—individuals, the gaps in their coverage are significant. And although some Federal courts and the Equal Employment Opportunity Commission have interpreted Title VII of the Civil Rights Act of 1964 as addressing aspects of the problem, the law under that statute remains uncertain and developing. A clear Federal prohibition of workplace discrimination against LGBT individuals is needed.

Sixteen States[4] plus the District of Columbia currently prohibit workplace discrimination based on sexual orientation or gender identity. Another five States[5] prohibit workplace discrimination based on sexual orientation but do not include any prohibition on gender identity discrimination. But the enforcement procedures and remedies for those statutes vary. They do not provide the clear and strong set of remedies—crucially including access to Federal courts—that Congress has developed for workplace discrimination over the past five decades. And LGBT workers outside of those States enjoy no clear State statutory protection against discrimination at all.

As for title VII, a growing body of cases holds that discrimination against LGBT individuals can, at least in some circumstances, violate the statute's prohibitions on sex discrimination. Relying on the well-established principle that title VII prohibits discrimination motivated by an individual's failure to conform to sex stereotypes at work,[6] the Sixth, Ninth, and Eleventh Circuits have allowed claims brought by

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[2] See Williams Inst., Economic Motives For Adopting LGBT-Related Workplace Policies, Oct. 2011, available at *http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf*.

[3] Pizer et al., *supra* note 1, at 721.

[4] California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

[5] Delaware, Maryland, New Hampshire, New York, and Wisconsin.

[6] See *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'") (internal quotation marks omitted; quoting *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978)).

transgender individuals under the statute to proceed.[7] In discharging its responsibilities to adjudicate title VII claims brought by Federal employees, the Equal Employment Opportunity Commission has recently held that discrimination against an individual because she is transgender violates the statute. The Commission reached that conclusion both under a sex stereotyping theory and because discrimination against someone because she changed her sex is a quite direct form of discrimination because of sex (just as discrimination against someone because she changed her religion is discrimination because of religion).[8] And the EEOC's Office of Federal Operations has, on two recent occasions, concluded that a lesbian or gay individual can challenge workplace harassment where the harassment is motivated by the individual's failure to conform to gender stereotypes.[9]

But these developments are not grounds for complacency, and they do not detract from the compelling need for Congress to enact ENDA. A number of courts—even those that have permitted claims by some LGBT plaintiffs to proceed—have gone to great pains to separate out those cases that "really" involve sex stereotyping (and thus may proceed under title VII) from those that "really" involve sexual orientation discrimination (and thus, according to these courts, may not).[10] The result is uncertainty—for lesbian, gay, bisexual, and transgender workers and for employers alike. The only way to provide clear and certain protection for LGBT workers is to write that protection explicitly into Federal law. That is precisely what ENDA would accomplish.

ENDA IS AN APPROPRIATELY TAILORED RESPONSE

In responding to these problems, ENDA would do nothing more than extend to sexual orientation and gender identity discrimination the same basic legal structure that has applied to other forms of employment discrimination for nearly 50 years. The bill takes its operative provisions directly from the operative provisions of title VII.[11] The experience that employers have developed in complying with those provisions over the past five decades, and the law developed under those provisions, will necessarily inform, guide, and ease employer compliance with ENDA.

One of the title VII provisions that ENDA incorporates deserves more extended discussion. That is the statute's religious exemption. Section 6 of ENDA plainly states that the statute "shall not apply" to an organization "that is exempt from the religious discrimination provisions of title VII."[12] Section 6 specifically refers to the two provisions of title VII that create religious exemptions: Section 702(a) and Section 703(e)(2).[13] Section 702(a) exempts any "religious corporation, association, educational institution, or society,"[14] and Section 703(e)(2) exempts any "school, college, university, or other educational institution or institution of learning" that "is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."[15] These exemptions have been well settled for decades, and they have been upheld as constitutional by the Supreme Court.[16]

At its 2009 hearing on ENDA, this committee heard testimony from Mr. Craig Parshall—who is also scheduled to appear as a witness before this committee today—that asserted that the bill's religious exemption would not be effective.[17] But Mr. Parshall's assertion is based on a clear misreading of ENDA's text. Mr. Parshall testified that because title VII exempts religious organizations only from the statute's prohibition of religious discrimination, and not from its prohibition of race or sex discrimination, the incorporation of title VII's exemption in ENDA will protect

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[7] See, *e.g., Glenn* v. *Burmby*, 663 F.3d 1312 (11th Cir. 2011); *Kastl* v. *Maricopa County Community Coll. Dist.*, 325 Fed. Appx. 492 (9th Cir. 2009); *Smith* v. *City of Salem*, 378 F.3d 566 (6th Cir. 2004).

[8] See *Macy* v. *Holder*, 2012 WL 1435995 (E.E.O.C., Apr. 20, 2012).

[9] See *Castello* v. *Donahoe*, 2011 WL 6960810 (E.E.O.C. Off. of Fed. Operations, Dec. 20, 2011); *Veretto* v. *Donahoe*, 2011 WL 2663401 (E.E.O.C. Off. of Fed. Operations, July 1, 2011).

[10] See, *e.g., Kalich* v. *AT&T Mobility, Inc.*, __*F.3d*__, 2012 WL 1623193 at *4 (6th Cir., May 10, 2012); *Vickers* v. *Fairfield Medical Center*, 453 F.3d 757, 762–65 (6th Cir. 2006).

[11] Compare S. 811, 112th Cong., 1st Sess. § 4(a)–(d) (2011), with 42 U.S.C. § 2000e–2(a)–(d).

[12] S. 811 § 6.

[13] *Id.*

[14] 42 U.S.C. § 2000e–1(a).

[15] 42 U.S.C. § 2000e–2(e)(2).

[16] See *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327 (1987).

[17] See Testimony of Craig L. Parshall before the Senate Comm. on Health, Education, Labor, and Pensions (Nov. 5, 2009).

religious organizations only if the courts conclude that sexual orientation discrimination is more like religious discrimination than like race or sex discrimination.[18]

That is simply incorrect. Section 6 of the bill under consideration states clearly that "[t]his Act"—i.e., ENDA-"shall not apply" to an entity "that is exempt from the religious discrimination provisions of title VII."[19] In other words, if an entity cannot be sued for religious discrimination under title VII, it cannot be sued for sexual orientation or gender identity discrimination under ENDA. It does not matter whether courts conclude that sexual orientation discrimination is more like religious discrimination or race or sex discrimination. That question is irrelevant, because ENDA exempts any entity that is exempt from the religious discrimination provisions of title VII. The bill could hardly be clearer on the point.

The bill before this committee also contains a number of limitations that sharply restrict the burdens it would impose on employers. Most notably, the bill provides that "[o]nly disparate treatment claims may be brought under this Act."[20] In other words, the statute does not provide a cause of action to challenge neutral employer practices that merely have a disparate impact on LGBT individuals. And the bill bars quotas and other preferential treatment.[21]

Finally, I would like to add a word about ENDA's protection of State employees. The bill would guarantee that employees of State governments have the same protections, and are generally entitled to the same remedies, as the employees of private employers. It would do so in two respects. First, it would require that States waive their sovereign immunity against ENDA suits brought by employees or applicants for employment in their programs or activities that receive Federal financial assistance.[22] Second, it would abrogate all States' sovereign immunity against suits brought for violation of the statute.[23]

Both of these provisions fit well within the constitutional requirements set by the Supreme Court. The Court has made clear that Congress can condition Federal funds on a State's waiver of sovereign immunity.[24] And ENDA's abrogation of State sovereign immunity responds to a significant history and pattern of employment discrimination against lesbian, gay, bisexual, and transgender State employees—discrimination that generally lacks even the "rational basis" that the lowest equal protection standard of review demands.[25] It thus satisfies the standards the Court has set for abrogation of State sovereign immunity.[26]

CONCLUSION

Thank you again for the opportunity to testify in support of this important legislation. I look forward to answering the committee's questions.

The CHAIRMAN. Thank you very much, Mr. Bagenstos.

And now, we will turn to Mr. Ken Charles from General Mills.

STATEMENT OF KENNETH CHARLES, VICE PRESIDENT OF DIVERSITY AND INCLUSION, GENERAL MILLS, INC., MINNEAPOLIS, MN

Mr. CHARLES. Good morning.

Thank you, Chairman Harkin for the opportunity to speak today in support of the Employment Non-Discrimination Act of 2011. And

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[18] See *Id*. at 4–5.
[19] S. 811 § 6.
[20] Id. § 4(g).
[21] Id. § 4(f).
[22] Id. § 11(b).
[23] Id. § 11(a).
[24] See *College Savings Bank* v. *Florida Prepaid Post-Secondary Ed. Expense Bd.*, 527 U.S. 666, 686–87 (1999).
[25] For discussions of the evidence of a widespread pattern of unconstitutional discrimination against LGBT State employees, see Williams Inst., Evidence of Employment Discrimination on the Basis of Sexual Orientation in State and Local Govt.: Complaints Filed With State Enforcement Agencies 2003–2007 (July 2001), available at *http://williamsinstitute.law.ucla.edu/research/workplace/evidence-of-employment-discrimination-on-the-basis-of-sexual-orientation-in-state-and-local-government-complaints-filed-with-state-enforcement-agencies–2003–2007/*; Letter from Matthew A. Coles to Hons. George Miller & John Kline (Sept. 23, 2009), available at *http://www.aclu.org/lgbt/discrim/41193leg20090923.html*.
[26] See, *e.g., Tennessee* v. *Lane*, 541 U.S. 509, 523–29 (2004); *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U.S. 721, 728–35 (2003).

thank you to the distinguished members of the Committee on Health, Education, Labor, and Pensions.

My name is Ken Charles and I am vice president of Global Diversity and Inclusion for General Mills. We are among the world's largest food companies, and market some of the world's best-loved brands including Cheerios, Green Giant, Nature Valley, Progresso and Yoplait to name a few. We have 35,000 employees worldwide with about half of them in the United States. We are headquartered in Minneapolis, MN where we trace our roots back over 150 years. Last fiscal year, we had sales approximately of $15 billion.

Our business case for diversity and inclusion is a simple equation: diversity plus inclusion equals business value. When you combine diversity, which we simply define as difference, with a culture that acknowledges, respects, and values all of our differences and similarities good things happen. We find ourselves able to connect with our consumers, customers, and communities. We reap new ideas and innovation, and we recruit and retain the talent we need to win now and in the future.

We are honored to represent corporate America's support for the passage of the Employment Non-Discrimination Act. Hundreds of companies, including 87 percent of the Fortune 500, have enacted protections for employees based on sexual orientation.

General Mills believes this legislation is good for business and good for America because it will help businesses attract and retain top talent, help provide a safe, comfortable, and productive work environment free of any form of discrimination or harassment, enabling our employees to bring their full selves to work and be fully engaged as productive employees, and help create a culture that fosters creativity and innovation that is vital to the success of all businesses.

We market our products to everyone. On average, U.S. consumers are placing one of our products in their baskets every 10 seconds, so it makes good business sense to value all of our consumers, which we do. But it also makes good business sense to create a workforce that represents all of the varied consumers and their unique perspectives. We cannot win if we only access a portion of the strong, rich, American talent pool. It is critical that we eliminate barriers that allow an individual's sexual orientation or gender identity to be a consideration for employment, promotion, or compensation.

Employees who are members of the GLBT community are incredible contributors to our enterprise. Absent their unique perspectives, talents, and gifts, we would be less competitive and successful; simply said, talent matters.

Now more than ever, American business needs to leverage the ingenuity of all sectors of our Nation. Discriminatory barriers to top talent just do not make business sense.

Respected employees are productive and engaged employees. We strive to be an environment where every employee is respected, valued, challenged, and rewarded for their individual contribution and performance. Our work environment is built on the foundation of our equal employment opportunity policy which prohibits discrimination based on age, race, color, religion, sex, national origin,

marital status, disability, citizenship, sexual orientation, gender identity, military service, or other characteristic protected by law.

Sexual orientation has been part of our policy since the early 1990s, and we added gender identity in 2004. We know our policy, and more importantly, our company culture exemplifies the spirit of the proposed Employee Non-Discrimination Act. In fact, a record setting 94 percent of our employees say General Mills provides a working environment accepting of differences in background and lifestyle.

It is important that we speak to the impact when that is not the case, particularly for GLBT employees. Could you be engaged, productive, effective if you lived in fear: fear of losing your job, being denied a promotion, being harassed or bullied on the job? For many qualified, hardworking Americans this is their experience because they lack the basic protection of a consistent Federal law. Their lack of engagement is a tax on American productivity that can be eliminated with the passage of ENDA.

I think of a manager who reported to me. He was a recruiter for our company and proudly displayed a picture of himself with his partner on his desk no different from any other family picture except that it had two gay men. Being able to share his family portrait allowed him to bring his full self to work. Freed from being in the closet, he could focus his full attention on finding the best and brightest talent for our company. I am even prouder when I see this diversity prominently represented by all kinds of families within the people's offices in General Mills.

Our culture of inclusion has been regularly recognized by a variety of external groups. Just this April, General Mills was recognized as the most reputable company in America. For many years, we have achieved a 100 percent perfect score on the Human Rights Campaign Corporate Equality Index which recognizes the policies and practices that we are supportive of for GLBT employees.

We know that providing an environment where people of different backgrounds and lifestyles can grow and thrive is essential to our long-term success. In our business, innovation is the key to survival. People with diverse experiences and backgrounds bring different and uniquely valued perspectives and solutions. This diversity drives innovation. That innovation fuels our growth and allows us to win in the global marketplace. That is why we support any practice or public policy that encourages bringing diversity to the table.

Internally, we have done several things to encourage diversity. In the mid-1990s, we created our GLBT network, Betty's Family named after one of our most familiar icons: Betty Crocker. This network's mission is to create a safe, open, and productive environment for General Mills GLBT employees and allies. Our employees comment frequently on the powerful impact this network has had on our ability to recruit and retain top talent. We know this network, in addition to our many other affinity groups, is a tangible demonstration of our commitment to attracting, developing, and advancing every unique employee.

We also understand that establishing a culture of respect is a baseline for our employment standards. Beyond that, we strive to be an employer of choice, a place where we demonstrate support for

the personal needs of our employees, to allow them to be fully committed to their work.

In 1999, we introduced domestic partner benefits, another demonstration that we are committed to providing equality to all our GLBT employees in all of our employment benefits. And we recently affirmed that we provide equal health coverage to transgender individuals without exclusion for medically necessary care.

In addition to promoting diversity because of the benefits of our business, we support the ENDA legislation because we believe it is a fundamental right of all American citizens to be treated fairly, with respect and dignity in the workplace regardless of their sexual orientation or gender identity.

Our support mirrors the States in which we are headquartered, Minnesota, which is 1 of the 21 States with law preventing discrimination on the basis of sexual orientation and 1 of the 16 that also includes gender identity. Our company values clearly state, "We do the right thing all of the time." We believe the Federal protection afforded to citizens by ENDA will be both a symbolic and effective means to deliver civil rights to all.

Mr. Chairman, thank you for the opportunity to speak to you this morning. It is an honor to be here.

[The prepared statement of Mr. Charles follows:]

PREPARED STATEMENT OF KENNETH CHARLES

SUMMARY

General Mills is proud to support the Employment Non-Discrimination Act (ENDA). As one of the world's largest food companies, our success is built on valuing our customers and our employers. The bottom line is that respected employees are productive employees. Our work environment is built on the foundation of our Equal Employment Opportunity policy, which prohibits discrimination based on a variety of factors including sexual orientation and gender identity. We support the ENDA legislation because we believe it is a fundamental right of all American citizens to be treated fairly, with respect and dignity in the workplace, regardless of their sexual orientation or gender identity. We believe Federal protection of our citizens will be a symbolic and effective means to deliver civil rights to all. We know that providing an environment where people of different backgrounds and lifestyles can grow and thrive is essential to our long-term success. ENDA will be good for business and good for America by helping businesses attract and retain top talent, helping provide a safe, comfortable and productive work environment, free from any form of discrimination, and helping create a culture that fosters creativity and innovation that is vital to the success of all businesses.

Thank you Chairman Harkin and Ranking Member Enzi for the opportunity to speak today in support of the Employment Non-Discrimination Act of 2007 (S. 811). And thank you distinguished members of the Committee on Health, Education, Labor, and Pensions. My name is Ken Charles and I am vice president of Global Diversity and Inclusion at General Mills. We are among the world's largest food companies and market some of the world's best-loved brands, including Cheerios, Green Giant, Nature Valley, Progresso, and Yoplait, to name a few. We have 35,000 employees worldwide with about half working in the United States. We are headquartered in Minneapolis, MN—where we trace our roots back over 150 years—and last fiscal year had annual sales of close to $15 billion.

Our business case for Diversity & Inclusion is a simple equation. Diversity plus inclusion equals business value. When you combine diversity, which we define simply as difference, with a culture that acknowledges, respects, and values all of our differences and similarities, good things happen. We find ourselves able to connect with our consumers, customers and communities. We reap new ideas and innovation. And we recruit and retain the talent to win now and in the future.

We are honored to represent Corporate America's support for passage of the Employment Non-Discrimination Act (ENDA). Hundreds of companies, including 87 percent of the Fortune 500, have enacted protections for employees based on sexual orientation. General Mills believes this legislation is good for business and good for America because it will:

- Help businesses attract and retain top talent.
- Help provide a safe, comfortable and productive work environment, free from any form of discrimination or harassment, enabling our employees to bring their full selves to work and be fully engaged as productive employees.
- Help create a culture that fosters the creativity and innovation that is vital to the success of all businesses.

We market our products to everyone. On average, U.S. consumers are placing one of our products in their baskets every 10 seconds. So it just makes good business sense to value all of our consumers, which we do. But it also makes good business sense to create a workforce that represents all of the varied consumers and their unique perspectives. We can't win if we only access a portion of the strong American talent pool. It's critical that we eliminate barriers that allow an individual's sexual orientation or gender identity to be a consideration for employment, promotion or compensation.

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I think of a manager that reported to me. He was a recruiter for our company and proudly displayed a picture of himself with his partner on his desk. No different from any other family picture except that it had two gay men. Being able to share his family portrait allowed him to bring his full self to work. Freed of being in the closet on the job, he could focus his full attention on finding the best and brightest for our company. I'm even prouder when I see this diversity prominently represented by *all* kinds of family pictures displayed in peoples' offices at General Mills.

Our culture of inclusion has been regularly recognized by a variety of external groups. Just this April, General Mills was recognized as the Most Reputable Company in America. For many years we have achieved a 100 percent score on the Human Rights Campaign's Corporate Equality Index, which recognizes the policies and practices we have that are supportive of our GLBT employees. We have also been honored as one of the:

- 100 Best Companies to Work For by Fortune magazine;
- 100 Best Corporate citizens by Corporate Responsibility magazine;
- 10 Best Companies for Working Mothers in Working Mother magazine; and
- Top 50 Companies for Diversity by DiversityInc.

We know that providing an environment where people of different backgrounds and lifestyles can grow and thrive is essential to our long-term success. In our business, innovation is the key to survival. People with diverse experiences and backgrounds bring different and uniquely valuable perspectives and solutions. This diversity drives innovation. That innovation fuels our growth and allows us to win in

the global marketplace. That's why we support any practice or public policy that encourages bringing diversity to the table.

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We also understand that establishing a culture of respect is a baseline for our employment standards. Beyond that, we strive to be an employer of choice—a place where we demonstrate support for the personal needs of our employees to allow them to be fully committed to their work. In 1999, we introduced Domestic Partner benefits, another demonstration that we are committed to providing equality to our GLBT employees in all of our employment benefits. And we recently affirmed that we provide equal health coverage for transgender individuals without exclusion for medically necessary care.

In addition to promoting diversity because of its benefits to our business, we support the ENDA legislation because we believe it is a fundamental right of all American citizens to be treated fairly, with respect and dignity in the workplace, regardless of their sexual orientation or gender identity. Our support mirrors the State in which we are headquartered—Minnesota—which is one of 21 States with laws preventing discrimination on the basis of sexual orientation and one of 16 that also includes gender identity. Our company values clearly state, "We do the right thing all of the time." We believe the Federal protection afforded to citizens by ENDA will be both a symbolic and effective means to deliver civil rights to all.

Thank you for the opportunity to speak to you today. I would be happy to take any questions.

The CHAIRMAN. Thank you very much, Mr. Charles.

And now, we will turn to Mr. Craig Parshall.

Mr. Parshall.

STATEMENT OF CRAIG L. PARSHALL, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL RELIGIOUS BROADCASTERS ASSOCIATION, MANASSAS, VA

Mr. PARSHALL. Thank you, Chairman Harkin and members of the committee. It is a pleasure being back here again.

NRB, National Religious Broadcasters, is a non-profit association representing, and supporting, and defending the First Amendment interests of Christian communicators including television, radio, and Internet broadcasters, publishing companies, churches with a media outreach, faith-based charity, and humanitarian organizations, as well as a number of Christian colleges and universities.

It is my opinion that ENDA as it stands now, in the form of Senate bill 811, would impose a substantial unconstitutional burden on religious organizations. Furthermore, it would interfere with their ability to effectively pursue their missions. That is because, in my opinion, section 6, the religious exemption that has already been referred to here, is both textually and constitutionally insufficient. I think at this point, a short, legal history might be in order.

In 1970, the Supreme Court recognized the importance of exemptions for religious groups with regard to general Federal laws, in that case, the tax code. The Supreme Court affirmed the 501(c)3 exemption for religious groups indicating that it, "Preserved the autonomy and freedom of religious bodies," and also helped insulate those religious bodies, which are constitutionally protected from government overreaching.

Nine years later, the Supreme Court in the NLRB case, a case involving exemption of religious schools from the National Labor

Relations Board, cited similar First Amendment grounds to support that crafted exemption.

Then in 1987, *Corporation of Presiding Bishop* v. *Amos, the Supreme Court* upheld the current exemption in title VII for religious organizations. In that case, in the context of the fact it permitted a Mormon church to terminate a lower level employee for purely religious grounds.

The Court noted that the group, not only the Mormon Church in that case but all religious groups, under the First Amendment must be left alone to define and carry out their religious mission and that adequate—and I emphasize "adequate"—statutory exemptions serve the purpose of preventing courts from conducting, in their words, "The kind of intrusive inquiry into religious belief that the district court engaged in, in this case." Those kinds of inquiries, of course, raise excessive entanglement problems under the Establishment Clause, and the Supreme Court noted that.

And then, of course, this year in the case of Hosanna-Tabor, the Supreme Court in a unanimous decision, upheld the so-called ministerial exception, which the courts of appeal were required to develop, because title VII had failed to do so, and so it was a matter of court-made law.

The circuit courts around the country, and then now the U.S. Supreme Court, recognized the need for, in the context of that case, clergy-level or minister-level employees with regard to their termination or demotion, those actions to be protected in terms of protecting the religious groups from later discrimination claims by clergy, ministers, or religious leaders at that tier of their employment.

So now we come to section 6 of Senate bill 811, which is substantially, I think it is identically, the same as the last go-round of ENDA in 2009. In essence, here is my objection.

No. 1, it is an apples and oranges ratcheting of Senate bill 811 to title VII. It creates huge problems for future courts to iron out what organizations and under what conditions would be exempted and which ones would not. I think that kind of uncertainty obviously raises constitutional problems. Here is the reason I think the courts are going to have a problem.

No. 1, there is a two-tier process of applying the religious exemption process in title VII, one that is cross-referenced from section 6. No. 1, is it a religious corporation, society, institutions, and so forth. Now, the courts have noted that Congress never defined what those terms mean. So they have had a problem applying that to what kinds of organizations to which that exemption would apply. Are they religious? Are they an organization? Are they a corporation?

Second of all, the second element in the religious exemption portion of title VII requires that the religious organization employ persons of a, "particular religion," and it is that conduct, not the organizational structure alone, but also specific conduct relating to the employee's religion that then triggers the exemption process.

Now, the courts have held almost uniformly, at least recently, that transgender issues, that serial sex stereotyping relative to homosexual claims and so forth can fall under the definition of sex discrimination. And yet under title VII, religious organizations ex-

cept for clergy-level employees get no protection on sex discrimination.

The possibilities of confusion of analysis by future courts, I think, are tremendous. And the chilling effect on religious organizations will be monumental.

Ladies and gentleman, I would suggest that we go back to the drawing board and take a look at the cases that I have cited for the proposition that exemptions must be clear. They must be grounded on the First Amendment protection of religious organizations. They must not lend themselves to confusion, and they must give a wide berth. And in the words of the Supreme Court in the Hosanna-Tabor case, while discrimination laws are important, so too are the basic fundamental religious liberties of religious organizations.

Thank you.

[The prepared statement of Mr. Parshall follows:]

PREPARED STATEMENT OF CRAIG L. PARSHALL

I am Craig Parshall, senior vice-president and general counsel for National Religious Broadcasters (NRB). I am appearing today to voice NRB's opposition to S. 811, the Employment Non-Discrimination Act of 2011 (ENDA). We oppose S. 811 because, among other reasons which I also outline below: (1) it generally illustrates the kind of unaccommodating approach to religious organizations that was recently rejected by a unanimous decision of the Supreme Court; (2) the insufficient "religious exemption" provisions of this bill would permit a substantial and unconstitutional burden to be placed on religious organizations; and (3) court decisions dealing with "gender identity" type employment discrimination claims indicate that a legal remedy is already available for such claims under existing title VII law, also subsuming within them numerous "sexual orientation" claims as well.

NRB is an association representing the free speech interests of Christian communicators, including television, radio and Internet broadcasters, as well as Christian publishing companies, churches with a media outreach, Christian broadcast programmers, preaching and teaching ministries, and faith-based charity and humanitarian organizations. NRB also has among its membership more than a dozen Christian colleges and Bible schools. The comprehensive nature of the Christian groups that we represent gives us a valuable perspective on the religious liberty and free speech implications of S. 811.

S. 811 AND THE CONSTITUTIONAL THREAT TO RELIGIOUS EMPLOYERS

Sexual Orientation and Gender Identity Cases as a Form of "Sex" Discrimination: the Gutting of Religious Liberty

Discrimination laws must not infringe on the constitutionally protected autonomy of religious organizations. *Hosanna-Tabor Evangelical Lutheran Church and School* v. *Equal Employment Opportunity Commission, et al.*,__U.S.__, 132 S. Ct. 694, 710 (2012) (unanimous decision, upholding the "ministerial exception" as a bar to title VII employment discrimination claims, where the Supreme Court stated:

> "The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission").

Requiring discrimination laws to adequately protect and accommodate the religious liberties of faith groups is not a mere legislative prerogative: it is a constitutional mandate. *Montrose Christian School Corp.* v. *Carver*, *Montrose Christian School Corp.* v. *Walsh*, 770 A.2d 111 (Md. Ct. App. 2001).

S. 811 is an exceedingly broad piece of employment discrimination legislation which protects persons from adverse employment actions that are based on the "actual or perceived sexual orientation or gender identity" of those persons. Structurally it would expand upon the scope and effect of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. 2000e et seq.

The bill purports to provide, in its section title to section 6, an "exemption" for "religious organizations." However, it does so by incorporating the current religious exemption provisions of title VII, an exemption scheme that would provide little ac-

tual protection for religious groups facing sexual orientation or gender identity-based claims. Section 6 of S. 811 provides, in part, that the "Act shall not apply to a corporation, association, educational institution, or society that is exempt from the *religious discrimination provisions* of title VII . . ." (emphasis added).

Title VII currently exempts religious organizations ("a religious corporation, association, educational institution, or society") regarding employment decisions impacting persons "*of a particular religion* to perform work connected with the carrying on" of the organization's "activities" (emphasis added). Thus, it is the position taken by the employer regarding the *religion of the employee* (not that person's sexual orientation or gender identity), when coupled with the religious nature and structure of the employer, that triggers the religious exemption protections found in title VII. As the court stated in *Petruska* v. *Gannon University*, 462 F.3d 294, 303 (3d Circuit 2006): "[title VII] exempts religious entities and educational institutions from its nondiscrimination mandate to the extent that an employment decision is based on an individual's [i.e. an employee's] *religious preferences*" (emphasis added). On the other hand, as that court also noted, "title VII 'does not' confer upon religious organizations the right to make those same decisions on the basis of . . . sex . . . " *Id*., citing *Rayburn* v. *Gen'l Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985).

Thus, this question is presented: will future courts construe "sexual orientation" or "gender identity" claims under S. 811 against religious employers as primarily asserting discrimination because of "sex," or discrimination because of "religion?" Numerous court decisions support the former scenario, having already determined that gender identity claims assert discrimination based on "sex." See: *Smith* v. *City of Salem*, OH, 378 F.3d 566 (6th Cir. 2004); *Schwenk* v. *Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Rosa* v. *Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Glenn* v. *Brumby*, 663 F.3d 1312 (11th Cir. 2011).

Recent legal developments coupled with the text of S. 811 itself indicate that the "gender identity" protections of the bill could spell particular difficulties for religious groups and would result in a serious violation of their religious liberties, despite the superficial insertion of the "religious exemption" language in section 6. As a textual matter, the bill prohibits employment discrimination against persons on the basis of perceived or actual "sexual orientation or gender identity." It should be noted that, while each of those two categories is separately defined in the bill, it seems clear that the "gender identity" category ("gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth") is worded very broadly—broad enough in fact to subsume within it various claims of "sexual orientation" discrimination also.

This conclusion that both "gender identity" and "sexual orientation" claims are likely to be construed as a species of "sex" discrimination is supported by *Prowel* v. *Wise Business Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009): "Wise [the employer] cannot persuasively argue that because Prowel is homosexual, he is precluded from bringing a gender stereotyping claim" (submitting the claim of a homosexual for employment discrimination to a jury trial under existing title VII law based on "sex" discrimination). The court also noted the "line between sexual orientation discrimination and discrimination 'because of sex' [the latter category having been extended to include 'gender identity' status under case law discussed below] can be difficult to draw." *Id.* at 291.

It is also noteworthy that the court in *Prowel* observed that much of the alleged harassment levied by co-workers (and endorsed by the company) regarding the plaintiffs's effeminate conduct and mannerisms and which included criticism of his status as a homosexual, was *religious in nature*. *Supra* at 288 and 293. Yet the Third Circuit also concluded that despite this, the nature of this discrimination was *not* "religious discrimination" and therefore the plaintiff had no "religious discrimination" claim under title VII. Even though the plaintiff Prowel referenced allegedly discriminatory conduct expressly connected to the religious beliefs and expressions of his co-workers, the court concluded: " . . . we cannot accept Prowel's *de facto* invitation to hold that he was discriminated against 'because of religion' merely by virtue of his homosexuality." *Supra* at 293. This necessarily means that if Prowel was employed by a religious organization, and the same adverse conduct occurred after the enactment of S. 811, the court would have found that the employer would *not be entitled* to a religious exemption, because the employer could not show that it was in fact a "religious organization . . . exempt from the religious discrimination provisions of title VII . . ." regarding the plaintiff's claim. If no "religious discrimination" took place in *Prowel* v. *Wise Business Forms*, Inc. under title VII *before* S. 811 is passed, neither would "religious discrimination" be found to have taken place, sufficient to invoke the "religious exemption" in section 6 for an employer,

after passage of S. 811. This is true, because section 6 simply incorporates, wholesale, the existing religious discrimination exemption scheme of title VII, and the case law that has interpreted it. And under existing case law, religious employers receive no protection against "sex" discrimination lawsuits.[1]

Even further, on April 20, 2012, the Equal Employment Opportunity Commission (EEOC) rendered its decision in *Macy* v. *Holder*, Appeal No. 0120120821, officially recognizing "gender identity" discrimination claims by "transgender" individuals to qualify as "sex" discrimination under title VII. Thus, under title VII, except for disputes involving "minister" or other clergy type positions (see nt. 1 *infra*), such "sex" discrimination claims can be prosecuted against religious groups. Because S. 811 simply incorporates the existing exemption scheme of title VII for religious groups, if this bill is passed, they will have *no* exemption regarding "gender identity" employment disputes, as several court decisions, and now the administrative decision of the EEOC, consider such claims to be a species of "sex" discrimination. And many of those types of suits will also be available for homosexual plaintiffs as well, under the reasoning of *Prowel* v. *Wise Business Forms, Inc.*, *supra*.

A religious organization recently faced this type of "gender identity" discrimination claim under existing employment discrimination law. A former dean and faculty member of Spring Arbor University, an institution affiliated with the Free Methodist Church, filed a claim based on "sex" discrimination because of alleged "gender identity" mistreatment by the university. The plaintiff, a male, underwent gender change counseling and as a result, started wearing women's clothing, wearing makeup and painting his nails. When he was fired in the wake of religious objections from the Christian school, he filed an EEOC claim.[2] Later, the discrimination claim was settled, with the plaintiff stating that by the terms of the settlement he considered himself to have been "treated with justice and fairness . . . "[3] On the other hand many religious employers would probably prefer the kind of "justice and fairness" that comes from adequate legal protections from such lawsuits in the first place. And in that regard, S. 811 would provide little solace for them.

I can envision that some future courts might seek to minimize this harsh and illogical result of section 6's "religious exemption" being nullified by its own terms, through a variety of legal gymnastics, a direct consequence of section 6 ratcheting itself into an unwieldy and mismatched partnership with title VII's religious exemption structure. For instance, courts might require, as an example, that a *central issue* involving the religious beliefs of the employee must be present in sexual orientation or gender identity cases before the "religious exemption" protections of section 6 could be triggered to protect the religious employer. Such reasoning could conceivably be justified by virtue of section 6's wording that only employers who are "exempt from the *religious* discrimination" [as opposed to sex or gender discrimination] provisions of title VII in given cases could be exempt under S. 811. What are the "*religious* discrimination provisions" of title VII, then, which Section 6 of S. 811 refers to? Clearly, under prior precedent, courts are likely to hold that this wording of Section 6 of S. 811 refers to adverse employment decisions made by an employer because of the *religion of the employee*. But what if an employee of a religious organization declares that he is a homosexual, yet maintains that his religious opinions are otherwise consistent with the beliefs of the religious employer except for the single issue of "sexual orientation?" If he is subsequently fired, would a court find that his discrimination claim is basically one based on "sex," a position substantiated by court decisions and the EEOC, or would the court decide that it is fundamentally a claim about discrimination based on the employee's "religion?"[4]

The uncertainty and complexity presented by this one scenario illustrates the burden imposed on the religious liberties of religious employers. After all, First Amendment rights of religious organizations can be fatally chilled when those groups must guess at how courts will construe their religious activities. "Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider [to be] religious." *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987).

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[1] The sole exception, of course, being those claims relating to employment of ministers and other clergy under the "ministerial exception" vindicated in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *Equal Employment Opportunity Commission, et al.*, __U.S.__, (2012).

[2] *Gender Change Costs Dean a Job*, InsideHigherEd.com, February 6, 2007.

[3] *Spring Arbor and Transgender Dean Settle*, InsideHigherEd.com, March 14, 2007.

[4] As an additional complication, a secular court's intense scrutiny of a religious employer's beliefs on these issues would likely run afoul of the "excessive entanglement" prohibitions of the Establishment Clause. See: "Establishment Clause" discussion, *infra*.

FREE EXERCISE OF RELIGION

When a government law sweeps into its regulatory purview religious groups whose operations are thereby substantially and selectively burdened, and it fails to provide ample exemptions for those religious organizations, it violates the Free Exercise provisions of the First Amendment. *Church of the Lakumi Babalu Aye* v. *Hialeah*, 508 U.S. 520, 531–32 (1997).

In the realm of private religious employers, broad and adequate exemptions for religious organizations are constitutionally imperative. *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987) (holding that title VII religious exemptions do not collide with the Establishment Clause but are fully consistent with it). The principle expressed in *Amos* is clear: where attempted "exemptions" in discrimination laws are so unclear, confusing, or overly broad so as to cause religious organizations to speculate as whether they are sufficiently "religious" either in their structure or in their activities to qualify for the exemption, then the religious liberty provisions of the First Amendment are violated. Moreover, where a law is passed in the area of employment discrimination and it fails, as S. 811 does here, to provide a sufficiently adequate exemption for religious institutions regarding faith-based employment decisions it also violates the Free Exercise Clause of the First Amendment. *Montrose Christian School Corp.* v. *Carver*, *Montrose Christian School Corp.* v. *Walsh*, 770 A.2d 111 (Md. Ct. App. 2001) (county employment discrimination code violated the Free Exercise rights of a private religious school by failing to provide a satisfactory, substantive exemption for it, the Court noting that

> "[a] uniform line of cases apply[] this principle, namely that the free exercise guarantee limits governmental interference with the internal management of religious organizations . . .").

The Free Exercise guarantee of the First Amendment reflects "a spirit of freedom for religious organizations, and independence from secular control or manipulation . . ." *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

ESTABLISHMENT CLAUSE

The Establishment Clause prohibits excessive entanglement between government and religion. *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (exemption of religious schools from Federal National Labor Relations Board oversight). *Walz* v. *Tax Commission*, 397 U.S. 664 (tax exemption for religious groups wisely facilitates a "desired separation [of government from religion] insulating each from the other"). Confusion has been created in the section 6 religious exemption of S. 811, as it attempts to exempt only those religious groups that would be exempt under title VII. But by doing that, section 6 will invite courts to engage in searching inquiries into the beliefs and doctrines of religious employers regarding homosexuality, lesbianism, bisexuality, transgenderism and similar issues in an attempt to parse-out the scope of the religious exemption in section 6; i.e., to determine whether, under the provisions of S. 811 (which *does* expressly include sexual orientation and gender identity as categories for protection) a religious employer would, under the language of section 6, be "exempt from the *religious discrimination provisions* of title VII" (which does *not* expressly provide protections for sexual orientation or gender identity). This kind of apples-and-oranges incorporation of Title VII into Section 6 of S. 811 creates another world of uncertainty for religious organizations.

One added concern is that Section 6 of S. 811, through its wholesale adoption by cross-reference to the title VII religious exemption scheme, has also incorporated title VII's separate exemption provision for religious schools. Regarding religious schools that do not otherwise qualify, that exemption applies where the school can show that its curriculum is determined to have been "directed toward the propagation of a religion." However, this is an intensely intrusive and unconstitutional inquiry for any secular court to undertake. A school seeking this exemption paradoxically would have to forfeit its private religious autonomy, in effect, in order to try to save it. When the government exercises an "official and continuing surveillance" over the internal operations of a religious institution, religious freedom under the First Amendment is jeopardized. *Walz* v. *Tax Commission of the City of New York, 397 U.S. 664, 675 (1970)*. A secular court may not review a religious body's decisions on points of faith, discipline, or doctrine, *Watson* v. *Jones*, 80 U.S. 679 (1872), nor may it govern the affairs of religious organizations. *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976).

FREEDOM OF ASSOCIATION

The First Amendment's free association guarantee has been interpreted to mean that a discrimination law could not be used to force the Boy Scouts of America to employ a professed homosexual as an assistant scout leader. *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000). And while *Dale* did involve a *non-profit association* as a party, and it addressed the groups "moral" (as opposed to religious) objections to homosexuality, the Supreme Court nowhere conditioned its reasoning on that fact that the Boy Scouts were a non-profit organization. Further, "moral" beliefs are not explicitly protected under the First Amendment as a stand-alone-right; rather they were protected in *Dale* because they were anchored to the Free Speech aspects of the right of association. By contrast, religion is given explicit protection in the First Amendment in its own right and therefore ought to receive *even more protection* than under the principles of the *Dale* case. This conclusion is buttressed by the decision in *Hosanna-Tabor, supra*:

> The EEOC and Perich [the plaintiff] thus see no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves. We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. . . . That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations.

Hosanna-Tabor, 132 S. Ct. 694, at 706. Private religious employers, like private associations, must be given the *right to reject* members or staff whose opinions would conflict with the religious organization's declared mission and beliefs. A religious group has "the autonomy to choose the content of [its] own message." *Hurley* v. *Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995).

SEC. 6 ADOPTS A PATTERN OF INCONSISTENT COURT DECISIONS

By bootstrapping title VII's religious exemption language into Sec. 6, the ENDA bill, S. 811, subjects religious organizations to a crazy-quilt of inconsistent decisions that have been rendered by the courts in construing the exemption language of title VII. This approach will stultify and confuse religious groups and lead to endless, expensive, and harassing litigation.

Title VII (42 U.S.C. §§ 2000e et seq.) provides in part:

> This title . . . shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Unfortunately, Congress "did not define what constitutes a religious organization, 'a religious corporation, association, educational institution, or society'" under title VII. *Spencer* v. *World Vision*, Inc. 570 F. Supp. 2d 1279, 1283 (W.D. Wash. 2008). As a result, "courts conduct a factual inquiry and weigh '[a]ll significant religious and secular characteristics . . .'" *Id*. (citations omitted).

What has resulted is a sad pattern of inconsistent and complex decisions which render very scant religious freedom to faith groups but which have sent a chilling pall over their activities not to mention their budgets: *Leboon* v. *Lancaster Jewish Community Center Association*, 503 F. 3d 217 (3d Cir. 2007) (Jewish Community Center qualified as a religious organization so that its firing of a Christian was nonactionable under title VII); *but compare*: *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F. 2d 610 (9th Cir. 1988) (no exemption for a small, closely held manufacturing shop whose owner had a clearly Christian world view and wanted it to permeate the work place). A Christian humanitarian organization dedicated to ministering to the needs of poverty-stricken children and families around the world was entitled to take adverse employment actions against an employee because of that person's religion because it qualified for exemption under title VII (*Spencer* v. *World Vision, Inc.*, *supra*); but a Methodist orphan's home dedicated to instilling in orphaned children Christian beliefs was held *not* to be qualified as a "religious corporation . . .", etc. where it had a temporary period of more secular leadership which was then followed by return to its original spiritual mission, *Fike* v. *United Methodist Children's Home of Virginia, Inc*. 547 F. Supp. 286 (E.D. Va. 1982). Further compare: *Feldstein* v. *Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983) (newspaper covering secular news but with close relationship with the Christian Science Church was allowed to discriminate on basis of religion).

The legal tests employed by the courts in deciding religious exemptions under title VII are complex and discordant. The 9th Circuit has employed a complicated six-

factor test. *Spencer, supra* at 570 F. Supp. 2d 1284. Whereas the 6th Circuit has applied an even more complex nine-factor test. *Id.* at 1285–86. In addition, the 9th Circuit has construed the religious exemption narrowly, whereas the 3d Circuit has not. *Id.*

The chances that the religious exemption in Sec. 6 of S. 811 would be given a very narrow, cramped interpretation are substantial. Where general discrimination laws collide with sincerely held religious beliefs, religion often loses. See: *Bob Jones University* v. *U.S.*, 461 U.S. 574 (1983) (private religious college loses its tax exempt status as a non-profit religious corporation because, while it admitted students from all races, its inter-racial dating rules were found to violate a national public policy regarding discrimination). In *Bob Jones University* the Supreme Court could only muster a meager reference to the religious school's Free Exercise rights, holding that the compelling interest of the government in stamping out discrimination outweighed "whatever burden" was caused to the organization's freedom of religion. *Id.* at 604. To the extent that "sexual preference" or "gender identity" discrimination are likened by the courts to racial discrimination, religious organizations will find little comfort under Sec. 6 of S. 811. See also *Swanner* v. *Anchorage Equal Rights Commission*, __U.S.__, 115 S. Ct. 460 (1994) (Thomas, J., dissenting) where the Supreme Court denied certiorari and declined the chance to vindicate the rights of a landlord who had been successfully sued for State housing discrimination where he refused on religious grounds to rent to unmarried couples.

Title VII grants a separate exemption specifically for religious schools. 42 U.S.C. §§ 2000e–2 (e)(2) provides exemption for such religious institutions provided that they are at least "in substantial part-owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society . . ." or where the curriculum "is directed toward the propagation of a religion."

But here again the resulting court interpretations there have been just as dismal: *EEOC* v. *Kamehameha School/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993) (private Protestant religious school was denied title VII religious exemption even though it had numerous religious characteristics and activities); *Pime* v. *Loyola University of Chicago*, 585 F. Supp. 435 (N.D. Ill. 1984)(Catholic college held not to be entitled to religious exemption relating to its preference for Jesuit professors over a Jewish professor), reversed on other grounds at 803 F.2d 351 (7th Cir. 1986)(where Judge Posner noted in his concurrence that, regarding the religious exemption issue, "the statute itself does not answer it," and "the legislative history . . . is inconclusive," *Id.* at 357). Contrast with: *Hall* v. *Baptist Memorial Care Corp.*, 215 F. 3d 618 (6th Cir. 2000) (Baptist entity training students for health care had sufficiently religious overtones to qualify for exemption regarding its firing of a lesbian staffer who was a minister at a pro-homosexual church).

NRB's membership includes numerous Christian radio stations that are commercial in their organizational structure. Considering the chilly reception such commercial religious entities receive by the courts when they are other than non-profit corporations, they can expect to be shut out of the exemption language of S. 811. We can add to that list other for-profit groups whose mission is distinctly Christian in nature but who will be denied exemption: Christian publishers, religious media consulting groups and agencies, food vendors who work exclusively with Christian schools, Christian-oriented bookstores, adoption agencies, counseling centers, and drug rehab facilities.

CONFUSION REGARDING THE F.C.C.'S EEO JURISDICTION

Currently, the Federal Communications Commission has promulgated EEO rules regarding broadcast licensees. An exemption is provided for a "religious broadcaster" regarding all employment decisions impacting religious belief, but they still must abide by a non-discrimination standard respecting "race . . . or gender." *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd. 24018 (2002) ("EEO Order"), paragraphs 50, 128.

Would S. 811 supersede the regulations of the F.C.C regarding the employment activities of broadcasters? We simply do not know. The only help we have in answering that comes from a sparse comment in *The King's Garden, Inc.* v. *F.C.C.*, 498 F. 2d 51, 53 (D.C. Cir. 1974) (F.C.C. is justified in pursuing its own EEO regulations against religious broadcasters where "Congress has given absolutely no indication that it wished to impose the [title VII] exemption upon the F.C.C."). Nothing in the language of S. 811 gives us any congressional intent to regulate broadcasters. On the other hand, would this new legislation be held to regulate those broadcasters that do not qualify for the F.C.C.'s definition of a "religious broadcaster?" The F.C.C. has generated a "totality of the circumstances" test for what is, or is not, a "religious

broadcaster" that differs from the title VII language. S. 811 exponentially increases the uncertainty regarding which law applies. Furthermore, would "gender identity" protections under S. 811 be viewed as the same, or different from the requirement imposed by the F.C.C. that even religious broadcasters not discriminate on the basis of "gender?" Again, such uncertainties only ratchet-up the probability that the religious liberties of Christian broadcasters and communicators will be chilled as they try to speculate what the law actually provides and what their rights really are.

SEXUAL ORIENTATION AND GENDER IDENTITY ARE CURRENTLY PROTECTED WITHOUT S. 811

S. 811 declares that the "purposes of his Act" are in part "to provide . . . meaningful and effective remedies" for "employment discrimination on the basis of sexual orientation or gender identity." Section 2, Purposes, paragraph (1). However, S. 811 appears to ignore the fact that remedies already exist in Federal employment law. In addition to the new rule pronouncement by the EEOC in *Macy* v. *Holder*, courts have construed title VII to provide "gender stereotyping" discrimination protection for homosexuals or persons of non-heterosexual gender identity under existing "sex discrimination" provisions. *Prowel* v. *Wise Business Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009); *Smith* v. *City of Salem, OH*, 378 F.3d 566 (6th Cir. 2004); *Schwenk* v. *Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Rosa* v. *Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Glenn* v. *Brumby*, 663 F.3d 1312 (11th Cir. 2011).

CONCLUSION

S. 811 is the result of a public debate over legal protections for sexual orientation and gender identity. But when we consider the sweep of American history, that debate is of very recent vintage. Compare, by contrast, the long-standing recognition in our Nation that religious liberty is a foundational right and that government should have few occasions to invade it. In fact, that concept of religious freedom predates the Constitution. America's first Supreme Court Chief Justice, John Jay, a decade before the constitutional convention, described the notion of free exercise of religion this way: ". . . Adequate security is also given to the rights of conscience and private judgment. They are by nature subject to no control but that of the Deity, and in that free situation they are now left. Every man is permitted to consider, to adore, and to worship his Creator in the manner most agreeable to his conscience."[5]

John Witherspoon, a member of the Continental Congress and signer of the Declaration of Independence was an evangelical minister who also served as President of the College of New Jersey (later renamed Princeton). His students at that school included future signers of the Declaration of Independence as well as delegates to the constitutional convention. James Madison was one of them. Witherspoon recognized the inherent relationship between civil liberty and religious freedom and when assaults came against either, both must rally in support of the other. He stated the matter well when he said in the paradigm of a prayer:

> "God grant that in America true religion and civil liberty may be inseparable and that unjust attempts to destroy the one, may in the issue tend to the support and establishment of both."[6]

S. 811 represents an assault on these historical notions of religious freedom. Time and the deliberative decisions of this Senate will determine whether the idea behind John Witherspoon's prayer will be honored. We urge this committee *not* to jettison the rights of people of faith, turn them into lesser privileges, or reduce them to a mere miniature of the concept that our Founder's advanced. If that happens here, it would mean that we have set ourselves on a very dangerous path, a radical departure from those basic liberties for which our Founders risked their lives, their fortunes and their sacred honor. Thank you.

The CHAIRMAN. Thank you, Mr. Parshall.

We will start a round of 5 minute questions for our witnesses. First, I want to start with Mr. Broadus. We have heard statistics regarding the high level of discrimination that gay, lesbian, and

[5] John Jay's "Charge to the Grand Jury of Ulster County," April 20, 1777 cited in Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay 1745–1826*, (New York: Da Capo Press, 1971), Volt. I, page 163.

[6] "The Dominion of Providence Over the Passions of Men," delivered at Princeton on May 17, 1776, from *The Selected Writings of John Witherspoon*, edited by Thomas Miller (Carbondale, IL.: Southern Illinois University Press 1990), page 147.

transgender Americans face. Again, I want to thank you for coming here today, sharing your personal experiences, putting a human face on this. We must always remember that behind these statistics are real people like you that, unfortunately, are too often not being judged by qualifications and skills, but by who you are. I have to imagine that your personal story is not unique through your work with the Coalition.

Can you tell us about encountering others who similarly have found themselves victims of discrimination with no legal recourse?

Mr. BROADUS. Thank you, Mr. Chairman.

And yes, I can. I get calls every single day of transgender Americans that are unemployed that have been discriminated against in the workplace. One of the most recent is a young woman who finally gets the job after being pushed around for several months. They keep her in the back. She is fine with that. She wants a job. Then she gets promoted, she is a good employee, by the general manager who had not seen her yet. Then he comes and she is immediately terminated once he sees her because he does not fit her expectation of what a female should look like.

Others are people that are harassed daily from not being able to use the bathroom in the workplace, to being harassed by what they look like, what they do not look like, having coworkers with epithets at them constantly, having supervisors that affirm those epithets. And it is horrendous to hear the stories that I hear on a daily basis of what people suffer and encounter to be employed to maintain a living for themselves and their family. So those are just a couple of the examples that are out there.

But it is overwhelming that these claims I hear every single day by somebody. And it does not matter where they live, it does not have to be mid-Missouri, I hear from people all over the United States.

The CHAIRMAN. Well Mr. Broadus, again, thank you for being here.

Earlier versions of ENDA did not include transgender individuals. This one does and I think we have become more aware that there is a gross discrimination against transgender people in our country.

I thank you for coming here and adding some more information that we need as a committee.

Miss Badgett, Dr. Badgett, I want to ask you. One of the suggestions of the critics of ENDA suggests that there will be a flood of litigation if this bill is adopted. But you said in your testimony that lawsuits had about the same frequency as others.

Could you just expand on that a little bit more?

Ms. BADGETT. Yes, we are able to see that the numbers of complaints are actually quite low when you compare the sexual orientation complaints to the race and gender, the race and sex, and disability complaints, and other complaints by other protected groups in the States that include sexual orientation in their nondiscrimination laws. And so right off the bat, just those raw numbers suggest that there are not going to be large numbers of complaints.

And yet, once we adjust them for the size of those populations, and I said as I recall, about 5 people per 10,000 lesbian, gay, and

bisexual people in a given State would file a complaint, on average, each year. If we looked at women in those States, it was also about 5 per 10,000 women. If we looked at people of color, it was about 6.5 per person of color in those States.

There are very similar rates to suggest that discrimination is an across the board phenomenon still, and that is why we have to have laws like this to give people recourse. And as suggested, LGBT people are as vulnerable as many of those other protected groups, and yet, it is not a flood of complaints. It is a number that you would expect, given the size of the lesbian, gay, and bisexual, and if we include transgender people, the population size is relatively small, so the numbers of complaints will not be huge.

The CHAIRMAN. Very good.

Last, Mr. Charles, critics complain that passage of this bill will lead to costly accommodations or, as I said, needless litigation. Now your company has been operating under a policy for years, and in the State of Minnesota with a strong antidiscrimination law.

What has been your experience about costly accommodations and needless litigation with General Mills?

Mr. CHARLES. Mr. Chairman, that has not been our experience at all. As you have mentioned, we are from a State that has provided protection, both based on sexual orientation and gender identity, for a number of years. We have not seen significant litigation or had to invest in significant accommodations.

The tools of human resources are very simple: communication, preparation and with those, we have been able to align our personnel so that all of our employees can be respected and valued.

The CHAIRMAN. Thank you, Mr. Charles. My time is up.

I have in order: Senator Merkley, Senator Franken, Senator Bennet, and Senator Casey.

Senator Merkley.

Senator MERKLEY. Thank you very much, Mr. Chairman. Thank you to all of you for your testimony.

Miss Badgett, the Chair raised a question about the frequency of lawsuits, and I think you responded to that with the national perspective. In Oregon, we have about 2,000 cases a year related to employment discrimination. Of those, an average of about 40, so basically 1 out of 50, have been transgender or sexual identity most of them related to male-female, if you will, race and so forth.

Does that 1 out of 50 fall into about the same category that you were referring to or slightly different?

Ms. BADGETT. Thank you. It does sound very proportional. Doing math in front of members of the Senate is always a tricky thing. But thinking about the size of the LGB population, that is more or less what you would expect to see, I think. That definitely would fall into the range that we found in our study.

Senator MERKLEY. Thank you very much. And I must say, I have not heard any businesses come back to the State legislature or come back to those of us who were involved at the time in expressing a concern that this created a flood of lawsuits because it has not been found.

Professor Bagenstos, you have years of experience with employment law both as a senior member of the Justice Department Civil Rights Division and as an academic.

Can you re-state, if you will, your understanding about whether it is necessary to pass ENDA in order to effectively counter discrimination in the workplace?

Mr. BAGENSTOS. I think it absolutely is. At the moment, there is no clear Federal remedy for the very extensive discrimination against lesbians, gays, bisexual, and transgender individuals in the workplace. And in most States in the Union, there is no State remedy either.

So it is absolutely necessary to pass this law, and all this law would do, would be to add sexual orientation and gender identity to the bases of non-discrimination in our well-established workplace discrimination laws.

Senator MERKLEY. There are some who have criticized ENDA saying that it would force businesses to create a quota system in order to, if you will, protect themselves. We have not seen that in Oregon, that concern did not materialize.

But as you look out, in terms of the national experience, would ENDA require employers to set up a quota system for the LGBT community or otherwise implement affirmative action policies?

Mr. BAGENSTOS. Not only would ENDA not require it or encourage it, it actually prohibits employers from establishing quotas. There is a specific provision in the statute that would do that.

Senator MERKLEY. Thank you very much.

Mr. Broadus, thank you for your testimony. This is very important to have direct experience from the frontline.

One of the individuals who helped illuminate this issue in Oregon is a woman, Laura Calvo, who was a transgender person who hid her identity to keep her job with the sheriff's department. For 15 years, she worked for the sheriff's department. At one point, she was named Deputy of the Year. She loved this job, but when she stopped hiding her transgender identity, she was fired. The challenges she went through were very much like the ones you described, and I think this story is repeated across the country.

Is it fair to say that the results of discrimination have a very direct and substantial impact on one's pursuit of life, liberty, and the pursuit of happiness, if you will?

Mr. BROADUS. Thank you, Senator.

And yes, I totally agree. People lose their career. It is over once people find out you are transgender, if you choose not to hide it. It also, if you choose to hide, it limits your productivity as Mr. Charles indicated before, because you are so fixated on pretending to be somebody that you are not. And then the lasting longevity of the emotional scars if you suffer the discrimination in the workplace, as well as the economic scars, which I still extremely struggle with, are just phenomenal.

One of my things that I share with people is that my student loan debt has quadrupled since I have left school because of the unemployment and the underemployment. And I sit here, almost a 50-year-old man wondering what I am going to do, and other people are in a much worse position than I.

Senator MERKLEY. Thank you.

The CHAIRMAN. I want to followup on that student loan issue.

Senator FRANKEN. Do you want to do it now?

The CHAIRMAN. Senator Franken, no that is OK. Go ahead, Senator Franken.

STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Thank you, Mr. Chairman, for holding today's hearing on this issue that affects so many Americans. I want to thank all the witnesses for your testimony today.

Because I feel so strongly about ENDA, I end up having conversations about it pretty regularly. People are often surprised to learn that Minnesota passed a law in 1993 that adds protections based on sexual orientation and gender identity to our human rights act. It was the first law of its kind in our Nation.

Since then, many States have followed suit, so all of us who live in those States, Iowa where the Chairman lives, and Oregon where Senator Merkley lives, Rhode Island, Colorado, Connecticut, Washington, Vermont, I think we can all personally attest that in our States the sky has not fallen. In fact, at least in Minnesota, our State is basically the same as it was before this law was passed in one small exception. About 20 or so people per year exercise their rights under this law. That is it. That is all; 20.

We still have many Fortune 500 companies based in our State like General Mills. I think actually more per capita than any other State. Most Minnesotans still go to church. We are still all entitled to our own personal opinion, but LGBT workers are protected from discrimination at work.

We can extend these common sense protections to all workers by passing ENDA. So again, thank you, Mr. Chairman, for this critical hearing.

Mr. Charles, thank you so much for being here today, for your testimony. As I mentioned earlier, I am very proud of Minnesota and our legacy of providing protections to LGBT workers.

Critics of ENDA allege that this legislation will raise the lawsuit costs or cause accommodation issues for businesses. I know that Senator Merkley asked you this, but this has not been an issue for General Mills, has it?

Mr. CHARLES. Not at all. Again, it has absolutely not been an issue for us.

Frequently we talk about the cost of this legislation in terms of accommodations and potential litigation. There is a real cost that all U.S. companies are paying right now in terms of loss of engagement when employees are in fear, loss of productivity when they cannot concentrate on bringing their whole self to their work every day, and loss of talent because of these artificial barriers to entry.

It is our opinion that these are not in the best interest of General Mills, the companies in Minnesota, or the companies across the United States.

Senator FRANKEN. Let me go to Professor Bagenstos or Professor Badgett on exactly that.

Is either of you familiar with the working paper by Peter, I think it is, Klenow and his colleagues called, "The Allocation of Talent?" In it, a group of economists describe their research and the surprising finding. Between 1960 and 2008, between 17 and 20 percent of U.S. economic growth could be attributed to gains made from women and people of color entering professional occupations,

and making better use of their talent. That is pretty stunning that workplace discrimination could have such a significant impact on our economy. The researchers cautioned that this is just a rough estimate, so we will keep that in mind.

But would you expect that a parallel economic argument could be made in regard to workplace discrimination based on sexual orientation and gender identity? This is for either of you.

Ms. BADGETT. That is always a dangerous thing.

Yes, I do believe that the same kind of effect that we have seen in terms of our other sort of commitments to non-discrimination, the contributions they have made to the economy have been real, and I think we would see the same kinds of things happening.

I mean, just taking Mr. Broadus' experience as an example of the difference that that can make. The fear, the need to manage one's stigmatized identity as a lesbian, gay, bisexual, or transgender person takes away from the work that people could be doing to better understand the work, how to do the work that they do, how to work with the people that they work with, as opposed to hiding.

So we know that there are many LGBT people today who still are not out to many of their coworkers, and the fact that they are——

Senator FRANKEN. It is what Mr. Charles said about bringing your full self to work.

Ms. BADGETT. Yes, yes. So that it remains an issue and we know that that is affected by having a non-discrimination policy where employees feel more comfortable, they are more likely to be who they are to be out as LGBT people, and people who are out are more satisfied with their jobs. They have lower levels of anxiety. They are less likely to be thinking about leaving their job, and all of those have a tremendous economic effect.

Just to take the turn over example, there are many studies that will also give you a range of estimates as to how much it costs when you lose a worker that you have trained, but they are all in the tens of thousands of dollars. So losing a single employee because they are LGBT, and not comfortable in the workplace, and have other options is something that will definitely cost companies money.

Senator FRANKEN. My time is up. I had wanted to ask Mr. Bagenstos and Mr. Parshall to sort of reconcile their differences. It probably would not have happened within——

Mr. PARSHALL. You never know, Senator.

Senator FRANKEN [continuing]. The 3 seconds I thought I had. I do have to go to the Judiciary Committee, but I will do that on paper. The record will be open for another week, as I understand it. But I want to thank you all for your testimony on this very important issue.

Thank you, Mr. Chairman for holding this.

The CHAIRMAN. Thank you.

Senator FRANKEN. Thank you.

The CHAIRMAN. I guess I was surprised to learn you were a Cheerios person. I thought you were more of a Lucky Charms kind of guy.

[Laughter.]

I did not know that.

Senator FRANKEN. I am not Irish. I am Jewish, and we are famous for loving Cheerios.

[Laughter.]

The CHAIRMAN. We are joined by Senator Murray, also a co-sponsor of the bill.

Senator Murray.

STATEMENT OF SENATOR MURRAY

Senator MURRAY. Thank you very much, Chairman Harkin.

I also want to thank all of our witnesses who are here today to talk about this very important issue.

I really believe that all Americans deserve to feel secure in their workplace, and discrimination based on sexual orientation or gender identity should not be tolerated in this country. There are currently 16 States, including my home State of Washington, that have active statutes that prohibit discrimination, and as we know, another 5 States bar discrimination on the basis of sexual orientation alone.

I am really proud to say that back in 2006, our Washington State legislature enacted a bill called Washington Law Against Discrimination that added protection from discrimination based on sexual orientation and gender identity to our State's civil rights laws. And it was a giant step forward for the civil rights of Washington State workers.

These State laws do provide important protections and should be commended, but employers in a majority of States can still fire, refuse to hire, or otherwise discriminate against individuals because of their sexual orientation or gender identity. Sadly, this discrimination is happening in workplaces across our country and we have heard some of the stories from the panel today. It really is time to put a stop to this kind of discrimination once and for all, because it is unacceptable.

I am very proud that I am an original co-sponsor of this important legislation that will demand that employers evaluate the performance of an employee on the basis of their work, not on their sexual orientation.

This legislation has bipartisan support. There is no reason it cannot be passed quickly through our committee. We need to work together, I believe, to strengthen protections for our workers and ensure an environment of equality at workplaces in America.

I really appreciate you having this hearing today, and I want to thank all of our witnesses who are here. I did have a couple of questions I wanted to ask.

Mr. Charles, I wanted to ask you, you and others have testified that nearly 90 percent of Fortune 500 companies include sexual orientation in their non-discrimination policies, and 50 percent also include gender identity.

As a representative of one of those companies, can you comment on why it is important for employers like General Mills to have inclusive workplace policies? Is it good for business?

Mr. CHARLES. Thank you, Senator.

As I have said before, it is absolutely critical that employees are able to bring their full self to work every day. It has been our experience that when employees can be their genuine, authentic selves,

their engagement, their productivity, and the innovation that they bring to the table is significantly increased. That allows our organizations to grow and thrive. It is the bedrock of our success. Talent is the key to everything that we do and we believe that ENDA will unleash the potential of thousands and millions of employees to be able to be their full selves.

Senator MURRAY. I appreciate that. And do you think General Mills' model could be replicated by other companies?

Mr. CHARLES. Absolutely. We already live in a place where 87 percent of the Fortune 500 are providing appropriate protections. We believe that companies that do provide those protections outperform those that do not.

While we recognize that we are large organizations, we believe that this is a model that can be replicated throughout corporate America regardless of the size of the business. It is as simple as talking to your employees, talking to other companies that have already gone down the road, and leveraging experts like HRC to provide guidance and insight on how to effectively introduce this sort of thing into your workplace.

Senator MURRAY. Very good. I appreciate that very much.

Mr. Broadus, I wanted to ask you. I have heard from many transgender constituents who have had similar experiences to yours. One constituent in particular was fired from her job after 29 years for what she believed was largely due to her transition from a male to a female.

I wanted to ask you today what your experience has been, what effect your experience has had on you both financially and emotionally.

Mr. BROADUS. It has been extremely tolling and it is still very emotional for me to talk about this issue in a personal way. I suffer posttraumatic stress. I lost an extremely well paying position and career, and have never been able to recover financially as well. I mentioned earlier, my student loan debt has quadrupled, and it is unbelievable.

I would have never fathomed in my whole life growing up where I grew up and believed that you just work hard, you go to work every day, you do the right thing, and the rest will follow that my life would have ended up this way because I was a stellar employee. I still have all my job reviews in my garage in a box because it was so demoralizing and dehumanizing to be let go.

I mean, for 7¾ years, I was a great and stellar employee, and then once I announced, which was already what was visible to the rest of the world because I was just being me, it ended very rapidly. And overnight, I became a lazy, shiftless, all these sorts of things just literally overnight once announcing transition and it was a quick break to the end at that point. I know many others that suffer the same thing, and it will go with me to my grave.

Senator MURRAY. Well, thank you very much for your courage both in going through what you have gone through, but also sharing it with everybody else, and giving us a face to identify with what is really an important issue in this country today. It's important to make sure that every person in this country has the ability to live up to their potential. It is better for our economy, it is better

for our businesses, it is better for our country. So thank you very much for your courage.

Mr. BROADUS. Senator, thank you.

Senator MURRAY. Absolutely.

And thank you, Mr. Chairman. I hope we can move this bill expeditiously.

The CHAIRMAN. I hope so. Thank you, Senator Murray.

I would, at this point, want to insert into the record a letter that we received just today from nearly 90 corporations supporting this bill, S. 811; 90 different corporations that are listed here. I just want you to know that General Mills is on the list, OK.

[Laughter.]

But companies all over America that everyone would recognize. So I ask consent that that be inserted in the record.

[The information referred to may be found in Additional Material.]

The CHAIRMAN. I also want to followup a little bit on what Senator Franken said about, not Minnesota, Iowa in 2007, 14 years later after Minnesota; I hate to admit that. But in 2007, we passed our employment discrimination on the basis of sexual orientation or gender identity for all businesses with four or more employees.

Prior to the passage of the law, several cities, several major employers had already had company policies protecting gay, lesbians, and transgendered employees from discrimination. But the point I want to make, Professor Badgett, is that Iowa shows the concerns regarding ENDA are not borne out by actual experience.

For example, one of the complaints is, as I raised earlier, about costly litigation and extensive litigation. In fact last year, of 1,539 total employment discrimination complaints to the Iowa Civil Rights Commission only 74, 4.8 percent were based on sexual orientation, and only 14, 0.9 percent were based on gender identity. Again, not an explosion of lawsuits based upon a law that we just passed in 2007.

So I think, again, that bears out that there is this idea that there is going to be an explosion of litigation just is not borne out by our experience in Iowa.

Mr. Bagenstos, let us get to this issue before we adjourn here. There have been, recently, several successful suits holding that, for example, discrimination based on gender identity is actionable under Title VII of the Civil Rights Act of 1964.

What do you say to those who say that title VII is enough to address the problem and ENDA is not necessary? Second, ENDA has a very broad religious exemption based on the exemption that exists in title VII, yet we have heard the criticism that this bill is an attack on religious liberties. Do you think religious liberty of religious organizations is at risk under this bill?

Mr. BAGENSTOS. Thank you. Let me answer as to whether title VII is enough to address these problems first, and I think the answer to that is clearly no.

There is some case law in some circuits that applies title VII under a sex stereotyping theory to certain cases involving LGBT individuals. But as you also see in the circuits that have applied that case law, the courts work very hard to draw a line between discrimination that is based on sex stereotypes versus discrimination

that is based on sexual orientation or gender identity. They say the first kind is in. It is covered under title VII. The second kind is out. This leads to a great deal of uncertainty.

This means that even in some of the circuit courts where LGBT plaintiffs have won some cases and they end up losing others. And, of course, in most of the circuits, they have not moved forward even to that extent.

So there is a need for a comprehensive, clear, Federal standard that applies across the country.

As to the religious exemption, the religious exemption in this bill, I think it is very important to respond to Mr. Parshall here, because he does accurately describe at least the stages of the analysis under title VII. He says there are two stages of the analysis under title VII.

First, is this entity the kind of entity that gets the religious exemption? And second, is the discrimination at issue discrimination based on religion?

But under ENDA, under section 6 of the bill before this committee, there is only one stage, the first stage of that analysis, and that is why none of the problems with respect that Mr. Parshall is identifying are really problems with this bill.

Under ENDA as it appears before this committee, the only question is: is this entity the kind of religious institution that would get an exemption from discrimination on the basis of religion under title VII? Once we decide that this is a religious corporation, a religious association, educational institution, or society, for example, that is the end of the matter. That institution gets an exemption under ENDA, period, from discrimination on the basis of gender identity or sexual orientation.

Now, there is a very, very extensive body of case law determining what is a religious corporation, association, educational institution, or society. What are the organizations that are covered by title VII's religious exemption? Like any legal test, you know, there are sometimes cases at the edges, but employers have over 40 years of case law to enable them to understand what is covered and what is not covered here. And there is no particular reason to believe that under ENDA, there would be any difficulty in understanding what the scope of the application of that exemption will be.

Mr. PARSHALL. Mr. Chairman, may I respond? Thank you.

The CHAIRMAN. Yes, in fact, I was going to turn to you for response on this. Mr. Parshall.

Mr. PARSHALL. I think we are down, and I am glad to hear that we are down to what, I think, is the analytical—of the difference, in my opinion, from Professor Bagenstos.

And that is that he believes that at least the intent and perhaps the letter of the exemption applies just to prong No. 1, which is, what type of organization is it in terms of its religious structure? And that is it. Once you analyze that under title VII, then you are either in or you are out.

The reason that I think that that is not an appropriate evaluation of the way that section 6 would really work in the real world is because if you look at section 6, it says, "This Act will not apply to those organizations, religious corporations," and so forth, "That are exempted from the religious discrimination provisions."

In order to be exempted from religious discrimination provisions, you must have both prongs, not one. And the second prong is the problem prong because it deals with a decision by a religious employer about the religion of the employee. Now, there is a case cited in my written testimony, *Prowel* v. *Wise Business Forms* case 2009. It was relatively recent involving an employee who was homosexual and he was criticized. The claim was a sex stereotyping claim because he did not really declare himself to be homosexual until later.

But he was criticized as an apparent or perceived homosexual and the objections he cites are predominantly religious. But the Third Circuit looked at it and said, "This is not a case of religious discrimination. It is a case of sex discrimination." And that is what I am afraid will happen with the courts as they try to parse and apply section 6.

Mr. BAGENSTOS. Mr. Chairman, might I reply.

The CHAIRMAN. Well, we are getting in this. Mr. Bagenstos for your reply and then Mr. Parshall, and then we will end it there. OK. This could go on forever.

Mr. BAGENSTOS. We could go on for a long time, I see, so let me just try to be very brief.

So what section 6 says is, "This Act shall not apply to a corporation, association," et cetera, "That is exempt from the religious discrimination provisions of title VII."

The CHAIRMAN. That is right.

Mr. BAGENSTOS. If it is the kind of corporation, association, educational institution, or institution of learning that is exempt from the religious discrimination provisions of title VII by this text, it is exempt from the sexual orientation and gender identity prohibitions of ENDA, period. There is nothing in here that says, "You have to decide whether discrimination on the basis of sexual orientation is religion or is sex."

The whole point of this statute is to avoid that question. That was the very first part, Mr. Chairman, of your question to me. Under title VII, the only way that people who are LGBT are protected is by bringing claims under sex discrimination. But this statute would avoid that. This statute is purely a separate cause of action for gender identity and sexual orientation discrimination, and it would exempt—and there are people, the ACLU, for example, has criticized the breadth of this exemption—it would exempt any institution that is covered by the religious exemption to title VII. Period.

The CHAIRMAN. Mr. Parshall.

Mr. PARSHALL. Thank you, Chairman.

If we go to the real world and we postulate a scenario where, let us say, you have a Christian bookstore, a large one so it comes within title VII. And you have an employee who has just been hired and then a month after he comes in, and he was hired as a man and he comes in dressed as a woman. He says, "Look, I am in a gender transition." And the owner of the Christian bookstore, I am going to say it is a for-profit, but it is a Christian bookstore says, "Well, I am sorry. That is inconsistent with our religious beliefs," and the person is terminated, and they bring a claim under Senate bill 811. What would happen?

The employee would come in and say, "Look, when I signed on, I agreed with your mission statement." You know, "All the basics of the Christian faith, who Jesus Christ was, who died for our sins. I believe in Him," and so forth. "It is just that you and I differ on this issue of gender identity. That is all." And the employer says, "Well, this is a substantial burden on us."

He goes to a court, and the judge has to now decide: is this a case of religious discrimination in which I agree, then in that situation, the Christian bookstore would get a pass. Or is it a case of sex discrimination in which case they would not get a pass.

And let me also say, if it is a for-profit bookstore, they probably will not get any kind of a pass because in the way in which the courts have treated for-profit as opposed to non-profit religious organizations, so.

Thank you, Chairman.

The CHAIRMAN. I am resisting the urge to jump into this——

[Laughter.]

The CHAIRMAN [continuing]. As a lawyer, but these debates can go on. I think this is a very technical part of the bill. This is technical, and there are always these kinds of technical aspects of legislation.

I do not know if Mr. Merkley, you are one of the authors of this bill, the sponsor of it. I would ask if you have any view on this yourself, since you are the lead sponsor on this. If you want to address yourself to it, if not that is fine. We will move on.

Senator MERKLEY. Mr. Chair, I think, the perspective Mr. Bagenstos has presented is very much in line with all of the legal efforts to create significant and broad exemptions for these organizations.

The CHAIRMAN. Then, let us go. I have then, since we were talking about it, I do have a letter for the record now, at this point, from a large number, I do not know exactly how many, religious organizations in support of S. 811. I will ask that it be put in the record at this point also.

[The information referred to may be found in Additional Material.]

Senator Merkley, you are recognized.

Senator MERKLEY. Thank you, Mr. Chair.

Thirty-seven religious organizations on that list, and thank you for putting it into the record.

I would like to also enter in the record a list of non-profit organizations. Let us see, 88 non-profit organizations that have sent a letter to us in support of the ENDA bill. And this is titled, "Co-sponsor, the Employment Non-Discrimination Act, letter from the Leadership Conference on Civil and Human Rights."

[The information referred to may be found in Additional Material.]

Senator MERKLEY. Mr. Parshall, when Oregon was wrestling with its non-discrimination act which, by the way, was much broader than employment applied to all retail activity, housing, restaurants, services of every kind. We wrestled with defining the boundaries of religious exemption. It seems to have worked very well in that I have never heard a single complaint in the 5 years since.

Have you taken a look at Oregon's religious exemption and the kind of experience on the ground, or in any other States that have been essentially down this path already?

Mr. PARSHALL. Specifically, I have not with regard to Oregon.

My experience has been that well-intentioned discrimination laws are often passed without understanding the difficulty that the courts often complain about when they step into areas of religion, because on the one hand, the judge is handicapped from going into areas of religious belief by the Establishment Clause. On the other hand, sometimes they are required to do so because it is the language of the exemption.

Thinking of a situation I had in a case up in Maryland involving a Christian school where the county passed an ordinance that was broader than the State that had not adequately provided protection for the Christian school, and they were sued. Had to go to the supreme court version of the court system there in Maryland, the court of appeals, to get redress. And they did establish the free exercise of religion rights at the school, only after 3 or 4 years of litigation.

So it is important, I think, to realize what a difficult area this is. And I will look at Oregon's because I am intrigued by the history that you recount. Thanks, Senator.

Senator MERKLEY. You are welcome.

Mr. Bagenstos, have you had the opportunity to look at any of the individual States that have wrestled with this challenge of identifying the religious exemption? Are there any insights to be gained from those States' experiences?

Mr. BAGENSTOS. I think there are insights to be gained from those States' experiences. I had because in the previous hearing on this bill 2 years ago because you, Senator, had referred to the discussions about the religious exemption in Oregon, I had looked into that in particular. And my sense of the experience is as an academic looking at it, sort of diving in, is very much as your sense as a public official in the State of Oregon that there really has not been the kind of problem in implementing it, and I think we see that elsewhere.

I think in this bill in particular, the real advantage is this bill simply incorporates a religious exemption that has been upheld as constitutional by the Supreme Court, so we know that the constitutional lines that Mr. Parshall is talking about drawing, have already been drawn appropriately, and it has several decades of experience behind it. We know the basic parameters of the religious exemption here. This is not something where we are going to have to create 4 years of litigation in order to figure out what it means. It is clear what it means. And I think that is a real advantage that we can get in a Federal law may be over a State law.

Senator MERKLEY. Thank you. You mentioned that the ACLU has been concerned about this being too broad.

Do you want to expand on that some?

Mr. BAGENSTOS. I think you could probably talk to someone from the ACLU about what exactly their concern is, but my sense is the concern that the—it is sort of, in some ways, the flip side of what Mr. Parshall is saying.

Under title VII, the religious exemption applies only to discrimination taken for religious reasons. Under this bill, the religious exemption would apply to any discrimination on the basis of sexual orientation or gender identity by an entity covered by the religious exemption of title VII whether or not it is taken for a religious reason.

It could be a religious college or university that discriminates on the basis of sexual orientation not because of any religious tenet, but just because of bias and that would be exempted by this bill.

In that sense, in some ways, the religious exemption here actually operates more broadly than the religious exemption under title VII, and certainly it does not operate any more narrowly than the religious exemption under title VII.

Senator MERKLEY. I am looking at section 7(a) which refers to, "The subchapter shall not apply to religious corporations," and then it gives a list and I assume the word "religious," applies to all these,

> "Religious corporation, or religious association, religious educational institution, religious society with the respect to the employment of individuals of a particular religion to perform work."

But essentially, it is the first part of the phrase of saying that any of these religious corporations, associations, educational institutions or societies are all exempted, and that is why this is considered such a broad exemption.

Mr. BAGENSTOS. Exactly.

Senator MERKLEY. Thank you very much, Mr. Chair.

I want to conclude my thoughts by simply saying—if that is what we are down to—wrestling with the exact legal language and the boundaries of religious exemption, then we are within reach of having a national framework that ends discrimination. Because State after State has wrestled with these boundaries and worked it out.

I do think that the way that this particular statute or proposed statute is crafted has been to address a major concern, which is to create a new list of uncertainties. But by basing the language on a past that is now 48 years old since this language was first introduced into law, so the definitions and the courts have worked it over time and time again. There is such an enormous case history is the soundest foundation, the most thorough and thoughtful foundation we could possibly have for extending protection to the LGBT community in terms of giving assurance that the definitions are well-examined and well-worked.

Let us not lose sight as we wrestle over clauses that raise questions about what is a religious association, the courts have worked that out, or what is an educational institution, the courts have worked it out. Let us not lose sight that each and every day American citizens are discriminated against in their employment or their potential employment in ways that have a profound impact on their opportunity to fully live their lives, to fully contribute, to fully pursue happiness. In other words, to do all that they can be, all that they are, which is a benefit to them and a benefit to our Nation. And this discrimination is absolutely wrong. It is morally wrong and we must end it.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Merkley, for your sponsorship of the bill and your strong support for it.

I would ask if anyone has any last thing they want to add before I close down the hearing. Any one last thing they want to bring up?

We will hold the record open for 10 days. I know Senator Franken had some additional questions he wanted to submit. We will hold the record open for 10 days for further insertions or for questions the other members of the committee might have.

I will close by saying that I thank you all for being here. This is, to echo what Senator Merkley said, this is an issue that we have to confront as a Nation, and we have to get over it. We have to get over it and move on.

Again, I want to be as protective as anyone of religious liberty in this country, but I would also remind people that in 1964, we passed the Civil Rights Act. Arguments were made that the 1964 Civil Rights Act would violate the religious liberty of employers to ban discrimination on the basis of race.

And so, we have been through this before that we would violate their religious liberty if we said you could not discriminate against African-Americans in our society. So we have been down that road before. And quite frankly, again just to echo what Senator Merkley said, this discrimination "has no place in our society". We wish we had done this a long time ago. People should be judged, as so many of you said, on the basis of their talents and who they are as an individual. They should be given every opportunity to succeed. They should not be discriminated against.

So I do not consider it a difficult area. I just do not consider it difficult. We simply should not discriminate on the basis of sexual orientation or sexual identity, period. And I think it is something that we need to pass, and we need to pass as soon as possible, and move on. A lot of States have done different things, companies have come forward; we know that.

It is time now to say to all Americans no matter who you are, no matter your sexual identity, your gender identity, if you are willing to work hard, if you are willing to contribute to society, then you are important to us. You are part of the American family. You ought to be included. That is really what this is all about.

The committee will stand adjourned.

{Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR CASEY

Mr. Chairman, thank you for agreeing to hold this important hearing on fairness in the workplace and the bipartisan Employment Non-Discrimination Act (ENDA). I joined Senators Merkley, Kirk and Collins in requesting today's hearing to highlight the pressing need for this legislation. Over the course of our Nation's history, great strides have been made to ensure the fair treatment of all citizens under the law. ENDA represents one more important step to ensure that basic American values of fairness and equality protect all citizens in the workplace.

The United States has already extended Federal employment discrimination protections for race, religion, sex, national origin, age and disability. These protections were enacted to ensure that all American workers are evaluated on the quality of their work and not some aspect of their identity. Beyond the argument for equity, these protections encourage broad-based participation in the workforce and strengthen the American economy. However, in many places, Americans still face employment discrimination as a result of their sexual orientation or gender identity. I am a cosponsor of ENDA because it would prohibit public and private employers, employment agencies and labor unions from considering an individual's sexual orientation or gender identity when making employment decisions such as hiring, firing, promotion or compensation. These protections would apply to Congress, the Federal Government and employees of State and local governments. ENDA would make exceptions for businesses with fewer than 15 employees and religious organizations.

Today we will hear the compelling arguments that ENDA is good for business and beneficial to the American economy. Perhaps most importantly, however, ENDA reaffirms our American ideal of fairness: workers should be judged on their skills and abilities. I look forward to this hearing as the first step toward swift and bipartisan passage of ENDA in both the Senate and the House.

PREPARED STATEMENT OF SENATOR KIRK

Chairman Harkin and Ranking Member Enzi, thank you for holding a hearing on this important legislation. I am proud to join Senator Merkley in co-sponsoring the bipartisan Employment Non-Discrimination Act (ENDA), S. 811. I was a strong supporter of this bill in the House of Representatives, and I am happy to help lead this effort in the Senate. In the long tradition of Senator Dirksen from Illinois—who helped pass the Civil Rights Act—I believe opposition to discrimination is a time-honored American tradition.

Nothing creates dignity more than a job, and this legislation will ensure that all Americans can realize their right to economic independence. Senator Merkley and I are following the lead of hundreds of top companies in the business community. Almost 90 percent of the Fortune 500 companies have implemented similar nondiscrimination polices and agree that an open corporate environment enables employees to be more enthusiastic, mentally healthy, and productive.

Many of these companies continue to advocate for workplace fairness, including Illinois employers, Hospira Inc., Orbitz Worldwide Inc., MillerCoors Brewing Co. and HSBC—North America. Another coalition member, Sara Lee Corporation, headquartered in Downers Grove, IL, says of anti-discrimination policies,

> "We believe that having a workforce comprised of people from different backgrounds and life perspectives can lead to better customer and consumer insights, greater innovation and a more inclusive environment for our employees."

Unfortunately, there are a number of misconceptions about this legislation. It does not create any quotas or preferential practices; in fact, both are explicitly prohibited in the bill. ENDA simply takes prejudices out of the employment decisionmaking process to ensure that employees or applicants are judged solely on their qualifications and job performance.

The bill also provides broad exemptions for religious institutions to protect First Amendment freedoms. Churches, synagogues and other places of worship; religious schools, colleges, seminaries and universities; and religious corporations, associations, and societies are all exempt from the requirements of this bill. In sum, ENDA provides the same religious freedom rights as existing employment discrimination civil rights laws.

ENDA is a common sense bill that ensures our workforce is the best it can be—competitive and consistent with American values of liberty, tolerance, and equality. Again, I appreciate the committee holding this hearing, and I look forward to moving ENDA through the legislative process.

PREPARED STATEMENT OF CAMILLE A. OLSON, SEYFARTH SHAW LLP

I am pleased to submit testimony addressing S. 811, the Employment Non-Discrimination Act of 2011 ("S. 811" or "ENDA"). I am a Partner with the law firm of Seyfarth Shaw LLP. Seyfarth Shaw is a national firm with 10 offices nationwide, and one of the largest labor and employment practices in the United States. Nationwide, over 350 Seyfarth Shaw attorneys provide advice, counsel, and litigation defense representation in connection with equal employment opportunities, as well as other labor and employment matters affecting employees in their workplaces.[1]

I. INTRODUCTION

I am the chairperson of Seyfarth Shaw's Labor and Employment Department's Complex Discrimination Litigation Practice Group. I have practiced in the areas of employment discrimination counseling and litigation defense for over 20 years. I am a member of both the California and Illinois bars. Members of our firm, along with our training subsidiary, Seyfarth Shaw at Work, have written a number of treatises on employment laws; advised thousands of employers on compliance issues; and trained tens of thousands of managers and employees with respect to compliance with their employer's policies relating to equal employment opportunities and non-harassment in the workplace, as well as the requirements of State and Federal employment laws. We have also actively conducted workplace audits and developed best practices for implementation of new policies addressing employer obligations on a company-wide, state-wide, and/or nationwide basis (depending on the particular employment practice at issue).

My personal legal practice specializes in equal employment opportunity compliance—counseling employers as to their legal obligations under Federal and State law, developing best practices in the workplace, training managers and supervisors on the legal obligations they have in the workplace, and litigating employment dis-

[1] I would like to acknowledge Seyfarth Shaw attorneys Condon McGlothlen, Laura Maechtlen, Annette Tyman, Sam Schwartz-Fenwick and case assistants Chris Nelson and Craig Nelson for their invaluable assistance in the preparation of this testimony.

crimination cases. I also teach equal employment opportunity law at Loyola University School of Law in Chicago, IL. I am a frequent lecturer and have published numerous articles and chapters on various employment and equal employment opportunity issues. For example, I am co-editor of a book entitled *Guide to Employment Law Compliance* for Thompson Publishing Group (2012); and I, along with other Seyfarth Shaw partners, have conducted numerous webinars, teleconferences, and full-day seminars across the country for employers and the Society for Human Resource Management on an employer's EEO obligations. I am also a member of the U.S. Chamber of Commerce's Policy Subcommittee on Equal Employment Opportunity, and I am a member of the Board of Directors of a number of business and charitable institutions.

II. SUMMARY OF TESTIMONY

I have been invited to submit testimony concerning the impact of the Employment Non-Discrimination Act of 2011 in the employment context, separate and apart from my relationship with the above-noted institutions, clients, and associations. I strongly support equal opportunities in employment, and, in particular, ensuring that employment decisions are based upon an individual's qualifications for a job (including education, experience, and other relevant competencies), as well as other legitimate non-discriminatory factors. Similarly, I believe that fair and consistent application of workplace practices and policies is instrumental to an employer's success as an employer of choice in the community.[2]

My purpose in providing this testimony is not to comment positively or negatively on whether the U.S. Senate should enact S. 811 into law as sound public policy. Rather, my testimony is a summary of my legal analysis concerning certain provisions of S. 811 as they apply to private sector employers only.[3] This analysis is provided within the context of other Federal non-discrimination in employment legislation, such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. It is also provided to highlight certain practical uncertainties sure to be faced by employers attempting to comply with its provisions, and by employees attempting to understand their rights and obligations under ENDA. As such, this testimony is provided in the hopes that it will result in the clarification of certain of S. 811's provisions for the benefit of employees and employers alike. If S. 811 passes, such clarifications would minimize confusion and litigation over the meaning of certain provisions, and enable employers to conform with congressional intent as expressed through S. 811's plain language. This would also better track the protections afforded to other protected groups under title VII, as amended, and related Federal employment discrimination statutes.

A drafted, S. 811 clearly provides the following:

- S. 811 prohibits employers from discriminating against an individual based on that person's actual or perceived sexual orientation or gender identity with respect to employment decisions and other terms, conditions, and privileges of employment.[4]
- S. 811 prohibits employers from discriminating against employees or applicants by limiting, segregating, or classifying them on the basis of their actual or perceived sexual orientation or gender identity in a way that adversely affects them.[5]
- S. 811 prohibits employers from discriminating against an individual based on the perceived or actual sexual orientation or gender identity of a person with whom that person associates.[6]

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[2] Seyfarth Shaw is a nationwide employer of over 1,650 persons providing services throughout the United States. Seyfarth Shaw's non-discrimination policy, applicable to all employees, states as follows:

"Seyfarth Shaw is committed to the principles of equal employment opportunity. Firm practices and employment decisions, including those regarding recruitment, hiring, assignment, promotion and compensation, shall not be based on any person's sex, race, color, religion, ancestry or national origin, age, disability, marital status, sexual orientation, gender identity or expression, veteran status, citizenship status, or other protected group status as defined by law. Sexual harassment or harassment based on other protected group status as defined by law is also prohibited."

For the past 5 years, Seyfarth Shaw has achieved a perfect score of 100 percent on the Human Rights Campaign Corporate Equality Index, a survey of workplace practices for the LGBT community.

[3] My testimony is limited to S. 811's application to private sector employers. It does not specifically address S. 811's provisions unique to religious organizations (Section 6), the armed forces (Section 7), or to local, State, or Federal Governments (Section 3(a)(4)(b–d)).

[4] S. 811, Section 4(a)(1).

[5] S. 811, Section 4(a)(2).

[6] S. 811, Section 4(e).

• S. 811 prohibits employers from retaliating against an individual based on the individual's opposition to an unlawful employment practice, or for participating in a charge, investigation, or hearing.[7]
• S. 811 does not prohibit an employer from enforcing rules and policies that do not intentionally circumvent its purposes.[8]
• S. 811 does not require an employer to treat an unmarried couple in the same manner as a married couple for employee benefits purposes.[9] The term "marriage" as used in S. 811 is defined in the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7 et seq.[10]
• S. 811 requires that an employee notify their employer if the employee is undergoing gender transition and requests the use of shower or dressing areas that do not conflict with the gender to which the employee is transitioning or has transitioned. An employer may satisfy the employee's request by either: (1) providing access to the general shower or dressing areas of the gender the employee is transitioning to or has transitioned to; or (2) by providing reasonable access to adequate facilities that are not inconsistent with that gender.[11]
• S. 811 does not require employers to build new or additional facilities.[12]
• S. 811 does not require or permit employers to grant preferential treatment to an individual because of the individual's actual or perceived sexual orientation or gender identity.[13]
• S. 811 does not require or permit an employer to adopt or implement a quota on the basis of actual or perceived sexual orientation or gender identity.[14]
• S. 811 allows employers to continue to require an employee to adhere to reasonable dress and grooming standards compliant with other applicable laws consistent with the employee's sex at birth, so long as an employee who has notified their employer that they have undergone or are undergoing gender transition is allowed the opportunity to follow the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.[15]
• S. 811 requires employers to post notices that describe its provisions.[16]
• S. 811 would be effective 6 months following the date of its enactment, and it does not apply to conduct occurring prior to its effective date.[17]

However, as drafted, S. 811 creates the following ambiguity and uncertainty:

• Whether title VII and ENDA will provide duplicate causes of action for sex discrimination, including sex stereotyping;
• How "disparate impact" claims will be defined under ENDA;
• Whether ENDA was intended to provide more robust remedies for attorney's fees than those available under title VII;
• Determining what triggers an employer's affirmative obligations with regard to shared facilities and application of its dressing and grooming standards;
• Whether "certain shared facilities" include restrooms; and
• Whether employers are required to modify existing facilities.

III. THE EMPLOYEE NON-DISCRIMINATION ACT OF 2011

A. Existing Protections Against Sex Discrimination in Employment

Existing Federal employment laws prohibit discrimination on the basis of an individual's sex. Under Federal law it is unlawful to:

• Discriminate against a person because she is a female;[18]
• Discriminate against a person because he is a male;
• Discriminate against a person because she is pregnant;[19]

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[7] S. 811, Section 5.
[8] S. 811, Section 8(a)(1).
[9] S. 811 Section 8(b–c).
[10] At least two courts have recently held that portions of DOMA are unconstitutional. *See Windsor* v. *United States*, 10–cv–8435, 2012 WL 2019716 (S.D.N.Y. June 6, 2012); *Massachusetts* v. *U.S. HHS*, 10–2204, 2012 WL 1948017 (1st Cir. May 31, 2012). My testimony does not address issues related to the definition of "marriage" under DOMA.
[11] S. 811, Section 8(a)(3).
[12] S. 811, Section 8(a)(4).
[13] S. 811, Section 4(f)(1).
[14] S. 811, Section 4(f)(2).
[15] S. 811, Section 8(a)(5).
[16] S. 811, Section 13.
[17] S. 811, Section 17.
[18] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"); *see also* The Equal Pay Act of 1963, 29 U.S.C. § 206(d) et seq (the "EPA").
[19] *See* Pregnancy Discrimination Act of 1978, amending title VII § 2000e(k).

• Discriminate against a person by sexually harassing a member of the opposite sex based on his or her sex[20];

• Discriminate against a person by sexually harassing a member of the same sex based on his or her sex[21]; and

• Discriminate against a person due to gender stereotyping because of his or her sex.[22]

No Federal law, however, expressly prohibits employers from discriminating against employees based on their sexual orientation or gender identity.[23] Courts have recognized the difficulty that they often face in determining under title VII whether certain conduct is "because of the individual's sex" as opposed to their sexual orientation or gender identity. For example, the Seventh Circuit Court of Appeals has described the various factual settings raised by these cases as obligating them to "navigate the tricky legal waters of male-on-male sex harassment."[24] As a result, some courts have reached inconsistent results as to whether similar factual situations are covered by title VII's prohibition against sex discrimination where there is evidence that the discrimination was "because of . . . sex." For instance, some courts have found that males who behave femininely or who dress in women's clothing are not protected by title VII, while others conclude that they are protected by title VII.[25]

Administrative decisions have also created inconsistency in application of title VII. The Equal Employment Opportunity Commission ("EEOC") recently issued an administrative decision in the matter of *Macy* v. *Bureau of Alcohol, Tobacco, Firearms and Explosives*,[26] holding that transgender individuals may state a claim for "sex" discrimination under title VII, through multiple theories including per se "sex" discrimination and/or sex stereotyping. The decision expressly overrules the EEOC's own prior rulings, which had taken a narrow view of the concept of "discrimination

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[20] See *Meritor Sav. Bank* v. *Vinson*,477 U.S. 57 (1986).

[21] *Oncale* v. *Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 78 (1998) (male employee alleging he was sexually harassed by his male supervisor and two male co-workers, none of whom were alleged to be homosexual, alleges same-sex sexual harassment which is a violation of title VII); *Cherry* v. *Shaw Coastal, Inc.*, 668 F.3d 182, 188 (5th Cir. 2012) (Sexual harassment is a form of discriminatory treatment, and applies in any situation where there is discrimination "because of" sex, whether it be between members of the same or opposite sexes).

[22] *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989) (female employee alleging she was denied a promotion as a result of being described as being "macho," "overcompensating for being a woman," and being given advice to "take a course at charm school," and "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" in order to improve her chances for promotion, stated a cause of action under title VII for sex discrimination because she did not conform to the stereotypes associated with being a woman).

[23] See, e.g., *Larson* v. *United Air Lines,* No. 11–1313, 2012 U.S. App. LEXIS 11066, at *9, n.1 (10th Cir. June 1, 2012) (unpublished) ("Title VII discrimination is only cognizable on the basis of sex, not sexual orientation."); *Gilbert* v. *Country Music Ass'n*, 432 Fed. Appx. 516 (6th Cir. Tenn. 2011) (concluding that title VII prohibits only discrimination "because of . . . sex," not sexual orientation); *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (employer did not violate title VII when it terminated a transgendered employee finding that discrimination against a transsexual is not "discrimination because of sex"); *Hamner* v. *St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 704 (7th Cir. 2000) (the protections of title VII do not permit claims based on an individual's sexual orientation); *Creed* v. *Family Express Corp.*, No. 3:06 CV–465RM, 2009 U.S. Dist. LEXIS 237, at *14 (N.D. Ind. Jan. 5, 2009) ("Although discrimination because one's behavior doesn't conform to stereotypical ideas of one's gender may amount to actionable discrimination based on sex, harassment based on sexual preference or transgender status does not.").

[24] *See, e.g.*, *Hamm* v. *Weyauwega Milk Prods., Inc.* 332 F.3d 1058, 1061 (7th Cir. 2003) (sexual orientation not covered by title VII).

[25] Compare *Etsitty*, 502 F.3d 1215 (10th Cir. 2007) (employer did not violate title VII when it terminated a transgendered employee, finding that discrimination against a transsexual is not "discrimination because of sex") with *Glenn* v. *Brumby*, 663 F.3d 1312, 1317 (11th Cir. Ga. 2011) (concluding that discrimination against a transgendered individual because of gender-nonconformity is sex discrimination); *Smith* v. *City of Salem*, 378 F.3d 566 (6th Cir. 2004) (concluding a transgender plaintiff could bring a sex discrimination claim under title VII) and *Schroer* v. *Billington*, 577 F. Supp. 2d 293 (D.C. Cir. 2008) (employer violated title VII when it rescinded an employment offer upon learning the employee was transgendered). *See also*, Hamm, 332 F.3d at 1066 (Judge Posner's concurring opinion describing case law in this area as having "gone off the tracks" under title VII) and *Nichols* v. *Azteca Rest. Enters., Inc.* and *The Legacy of Price Waterhouse* v. *Hopkins: Does Title VII Prohibit "Effeminacy" Discrimination?*, 54 Ala. L. Rev. 193, Fall 2002, and *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, Apr. 2007.

[26] EEOC Appeal No. 0120120821 (April 23, 2012).

because of sex" under the statute in finding that it did not include transgender status.[27] It also conflicts with certain Federal court decisions.[28]

A number of jurisdictions have enacted legislation prohibiting discrimination in the private sector based on sexual orientation and/or gender identity. To date, 16 States and the District of Columbia prohibit discrimination based on gender identity and sexual orientation.[29] Twenty-one States and the District of Columbia prohibit discrimination based on sexual orientation.[30] The legal obligations imposed by State laws differ from State to State.

B. Summary of Federal Legislative Efforts to Enact ENDA

Legislation to prohibit employment discrimination on the basis of sexual orientation was first introduced in 1994 before the 103d Congress.[31] Since then, legislation has been introduced in almost every session of Congress to address this topic.[32] Most recently, in 2009, I provided legal analysis before this committee on S. 1584, a bill identical in scope and content to S. 811. I also provided testimony with respect to similar legislation that was also introduced before the House that year.[33]

Many of S. 811's provisions track the language of title VII, the principal equal employment opportunity statute that employers have used as their guidepost in developing appropriate policies and practices regarding non-discrimination in employment. For example, S. 811 references existing provisions of title VII to define certain terms, such as employee, employer, and employment agencies; and to reference specific enforcement powers, procedures, and remedies.[34]

The language contained in S. 811 demonstrates the significant examination and debate that has taken place over the years concerning the extension of protections in employment to individuals on the basis of sexual orientation and now, gender identity. Indeed, certain changes from the current version as compared to S. 1284 and/or the bill introduced in the House in 2007 ("ENDA 2007"), reflects an understanding of the need to provide clarity in the workplace to ensure compliance with the legislation, by carefully describing the obligations of employers and employees. Some examples of the clarifications urged in prior hearings and addressed in S. 811 are set forth below:

- ENDA 2007, Section 5 prohibited retaliation against an individual for opposing any practice made unlawful by the Act, or against an individual who made a charge or who provided testimony under the Act.[35] Given that the concept of retaliation is a well-understood principle in employment law, legal practitioners suggested ENDA track the language already available under existing laws to minimize confusion and litigation. S. 811 includes revised retaliation language that parallels the well-established language prohibiting retaliation contained in title VII.[36]
- ENDA 2007, Section 8(a)(1) provided:

> IN GENERAL—Nothing in this Act shall be construed to prohibit a covered entity from enforcing rules and policies that do not circumvent the purposes of this Act, if the rules or policies are designed for, and uniformly applied to, all

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[27] *See, e.g., Jennifer Casoni* v. *United States Postal Service*, EEOC DOC 01840104 (Sept. 28, 1984); *Campbell* v. *Dep't of Agriculture*, EEOC Appeal No. 01931703 (July 21, 1994); *Kowalczyk* v. *Dep't of Veterans Affairs*, EEOC Appeal No. 01942053 (March 14, 1996).

[28] *See* authorities cited in footnote 23, *supra*.

[29] These jurisdictions include California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, as well as the District of Columbia.

[30] These jurisdictions include those set forth directly above, as well as Delaware, Maryland, New Hampshire, New York, and Wisconsin.

[31] The Center for American Progress, FAQ: The Employment Non-Discrimination Act, *http://www.americanprogress.org/issues/2011/07/enda_faq.html* (last visited June 6, 2012).

[32] For instance, in 2002, hearings on S. 1284, legislation introduced in the 107th Congress, were held before this committee. This committee favorably reported the bill and it was placed on the Senate calendar. In 2007, protections on the basis of gender identity were included for the first time in a bill introduced only in the House of Representatives (H.R. 2015). Although hearings were held, the legislation proposed in 2007 did not garner enough support for passage in the House. Later that year, legislation that included only a prohibition against discrimination on the basis of sexual orientation was introduced and passed by the U.S. House of Representatives (H.R. 3685). Similar legislation was not introduced in the Senate in 2007.

[33] H.R. 2981, H.R. 3017.

[34] See, e.g., S. 811, Section 3 (Definitions—partial); Section 4 (Employment Discrimination Prohibited—partial); Section 5 (Retaliation Prohibited); Section 10 (Enforcement—partial); and Section 13 (Posting Notices).

[35] H.R. 2015.

[36] Compare H.R. 2015, Section (5) with S. 811, Section 5.

individuals regardless of actual or perceived sexual orientation or gender identity.[37]

Practitioners urged drafters to insert the word "intentionally" before the phrase, "circumvent the purposes of this Act" to ensure that Section 8(a)(1) would not be used to unintentionally incorporate concepts of disparate impact claims into ENDA. S. 811 has been revised to include the word "intentionally."

• ENDA 2007 section 17 and S. 1284 Section 19 provided that ENDA would take effect 60 days after the date of enactment. S. 811 provides for its effective date to be 6 months after the date of enactment. This 6-month lead time will be particularly helpful to employers to allow sufficient time to make necessary revisions to their policies, practices, and procedures. This will also provide adequate time for employers to train managers, human resource professionals, and employees to ensure compliance with a new Federal law.

C. S. 811 Requires Clarification

As described in section III.B. above, as drafted, S. 811 has provided clarity concerning certain provisions in prior House and Senate bills regarding many of the new obligations ENDA would impose upon employers. Notwithstanding these earlier clarifications, certain ambiguities still remain that were previously raised in 2009 with respect to S. 1584, but were not addressed in S. 811. These ambiguities warrant further discussion and analysis and are described below in two sections. Section 1 addresses general ENDA points requiring clarification. Section 2 addresses specific points with regard to the application of specific provisions of ENDA regarding an employer's facilities and policies to an employee's gender identity protections, and specifically to individuals who have undergone or are undergoing gender transition.

1. General Points Requiring Clarification

a. Whether Title VII and ENDA Will Provide Duplicate Causes of Action for Sex Stereotyping

ENDA is the only Federal legislation, that, if enacted, would expressly prohibit discrimination or retaliation on the basis of sexual orientation[38] and gender identity.[39] While courts have made clear that no Federal cause of action exists for discrimination on the basis of an individual's sexual orientation or gender identity,[40] as noted on pages 6–7, *supra*, some Federal courts have inconsistently extended title VII protections to factual situations brought on the basis of sex-stereotyping that more accurately involve claims of sexual orientation and/or an individual's gender identity. The EEOC has also recently interpreted title VII's prohibitions against sex discrimination to encompass claims by transgender individuals.[41]

If enacted in its current form, these same factual scenarios would clearly be actionable under ENDA given its broad definition of gender identity. What is sex-stereotyping if it is not discrimination based upon an individual's "appearance, or mannerisms or other gender-related characteristics . . . with or without regard to the individual's designated sex at birth?"[42] These concepts are overlapping, thus, certain factual situations that some courts and the EEOC have found actionable under title VII would most assuredly also be actionable under ENDA.[43]

Moreover, with regard to the relationship between ENDA and other laws, Section 15 of ENDA specifically provides as follows:

> This Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or regulation or any law or regulation of a State or political subdivision of a State.

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[37] Compare H.R. 2015, Section 8(a)(1) with S. 811, Section 8(a)(1).

[38] Sexual orientation is defined as "homosexuality, heterosexuality, or bisexuality." S. 811, Section(a)(9).

[39] Gender identity is defined as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth." S. 811, Section 3(a)(6).

[40] *Dawson* v. *Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2004); *Bibby* v. *Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Simonton* v. *Runyon*, 232 F.3d 33 (2d Cir. 2000); *Spearman* v. *Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); Hamm, supra, 332 F.3d 1058; *Centola* v. *Potter*, 183 F.Supp.2d 403 (D.Mass. 2002).

[41] *Macy* v. *Bureau of Alcohol, Tobacco, Firearms and Explosives*, EEOC Appeal No. 0120120821 (April 23, 2012).

[42] S. 811, Section 3(a)(6); *see also Price Waterhouse*, 490 U.S. 228.

[43] The EEOC's decision in *Macy* v. *Bureau of Alcohol, Tobacco, Firearms and Explosives*, EEOC Appeal No. 0120120821 (April 23, 2012) applies only to the EEOC's adjudication of administrative charges at the regional office level and to the EEO offices of Federal agencies.

Given this language, it is clear that ENDA, as currently drafted, serves only to add protections on the basis of sexual orientation and gender identity, and that it does not replace any claims that would otherwise be actionable under title VII.

Yet, such a reading of the two statutes would lead to the unintended consequence of a potential dual recovery by a successful plaintiff filing claims under both title VII and ENDA for the same alleged wrongful conduct. As such, it is critical that ENDA include language which makes clear that ENDA is the exclusive Federal remedy for any alleged conduct on the basis of sexual orientation or gender identity as those terms have been defined. Accordingly, I urge this committee to carefully consider the interplay between ENDA and title VII to ensure that there is not an unintended duplication of remedies and that congressional intent be made abundantly clear in this regard. I suggest consideration of language to the effect of: "Nothing in this Act shall be interpreted to permit a double recovery of damages." This language will ensure that congressional intent on this issue is clear and may minimize litigation over this issue.

b. Disparate Impact Claims Are Not Available Under S. 811

Disparate treatment claims are actionable under S. 811.[44] S. 811 prohibits intentional discrimination only.[45]

In contrast, disparate impact claims are not available under S. 811.[46] In other words, S. 811 does not provide individuals with a remedy for alleged discrimination that is based on a rule or policy that does not intentionally circumvent ENDA, so long as the rules and policies are applied equally to all individuals regardless of their sexual orientation or gender identity.

The most familiar statutory definition of a disparate impact claim is in title VII.[47] Thus, to ensure that disparate impact claims are appropriately defined, *and properly excluded from ENDA*, a reference to title VII's statutory definition of a disparate impact claim should be included in ENDA. The current language leaves some ambiguity. For example, Section 4(g) of ENDA provides as follows: Disparate Impact—Only disparate treatment claims may be brought under this Act.

Thus, while section 4(g) is entitled "Disparate Impact"—the text of the provision does not explicitly define disparate impact claims, or expressly state that they may not be brought under ENDA. Rather, the provision instead affirmatively states that only disparate treatment claims may be brought under ENDA. Accordingly, this committee should also consider adding a provision that explicitly defines disparate impact claims and excludes disparate impact claims for sexual orientation and gender identity from ENDA's prohibitions to ensure that congressional intent is clear as to the claims that are exempted from S. 811. I would suggest this committee adopt language in section 4(g) defining the parameters of Disparate Impact claims more clearly, such as:

> Disparate Impact claims as described in title VII, section 2000e–2(k), or any other statute, cannot be established under this Act. Only disparate treatment claims may be brought under this Act.

c. The Remedies Available Under S. 811 Should Parallel Those Available Under title VII

S. 811, Section 10(b)(1) specifically provides that the procedures and remedies applicable are those set forth in title VII (42 U.S.C. § 2000e et seq.). Despite this provision, Section 12 of ENDA expands the remedies with respect to attorney's fees for claims arising under ENDA beyond those currently available under title VII. Specifically, Section 12 provides as follows with regard to attorney's fees:

> Notwithstanding any other provision of this Act, in an action or ***administrative proceeding*** for a violation of this Act, ***an entity described in section 10(a) (other than paragraph (4) of such section)***, in the discretion of the entity, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs. The Commission and the United States shall be liable for the costs to the same extent as a private person.[48]

In contrast, title VII provides as follows with regard to attorney's fees:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United

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[44] S. 811, Section 4(g).
[45] S. 811, Section 8(a)(1).
[46] *Id.*
[47] 442 U.S.C. § 2000e–2(k).
[48] S. 811, section 12. Attorney's Fees (emphasis added).

> States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.[49]

Specifically, S. 811, Section 12, expands the remedies that would otherwise be available under title VII by permitting a prevailing party in an "administrative proceeding" to recover a "reasonable attorney's fee (including expert fees) as part of the costs." Although it is unclear who is a "prevailing party" under ENDA, employees who receive a finding of substantial evidence from the Equal Employment Opportunity Commission ("EEOC") or another administrative agency as described in Section 10(a) may arguably be entitled to attorney's fees. This is a significant expansion of the remedies available under title VII.

This inconsistency between ENDA and title VII would mean that a plaintiff who alleges discrimination on the basis of sexual orientation or gender identity would be entitled to greater remedies than a plaintiff who alleges discrimination on the basis of race, color, religion, sex, or national origin. Further, other employment discrimination statutes, including the ADA, adopt title VII's remedies. ENDA, in contrast, as discussed, would add new remedies.

Moreover, the very nature of the investigative proceeding at the administrative agency phase demonstrates why an award of attorney's fees would not be appropriate. First, EEOC decisions are not considered "final orders" subject to appeal, thus an employer would be deprived of its due process rights to contest any such award. In fact, the EEOC is not required to provide documented reasons for its decisions. Accordingly, an employer may not be provided a written basis for the EEOC's decision. Additionally, information submitted at the EEOC phase is produced to assist the EEOC in its investigation, and is not subject to the Federal Rules of Evidence.

The second significant departure contained in ENDA, as compared to title VII, relates to who is granted the authority and discretion to grant such awards. As noted above, under ENDA, courts and administrative agencies, such as the EEOC, are granted the authority to award attorney's fees. In contrast, title VII appropriately limits the authority to grant such remedies to the courts. Courts, and not administrative agencies, are best positioned to decide who is a "prevailing party" under the law. Such decisions should be made only after careful consideration and review of the admissible evidence as presented by both the plaintiff and the employer.

For these reasons, this committee should undertake a careful examination of Section 12 of ENDA to ensure that the remedies available to a plaintiff under ENDA are consistent with provisions under title VII, by specifically mirroring the language contained in title VII, 2000e–5(k).

2. Specific Provisions Requiring Clarification Regarding Gender Identity

Among other protections, S. 811 makes it a violation of Federal law for an employer to

> "discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity."[50]

S. 811 further provides as follows:

> [Section 8(a)(3)] CERTAIN SHARED FACILITIES—Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity due to the denial of access to *shared shower or dressing facilities in which being seen unclothed is unavoidable*, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or *upon notification* to the employer that the employee has *undergone or is undergoing gender transition*, whichever is later.[51]
>
> [Section 8(a)(5)] DRESS AND GROOMING STANDARDS—Nothing in this Act shall prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law, *provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of em-*

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[49] Title VII § 2000e–5(k). Attorney's Fees; Liability of Commission and United States for Costs (emphasis added).

[50] S. 811, Section 4(a)(1).

[51] S. 811, Section 8(a)(3) (emphasis added).

ployment, to adhere to the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.[52]

Thus, in addition to prohibiting discrimination in employment on the basis of gender identity, ENDA places affirmative obligations on employers. Specifically, employers are required to adjust their policies, practices, or procedures with regard to "certain shared facilities" and "dress and grooming standards" for a subset of individuals who have either "undergone" or who are "undergoing" transition to a gender other than their gender at birth."[53] These affirmative obligations present unique issues in the workplace that merit further consideration and reflection.

a. What Triggers an Employer's Affirmative Obligation?

The first issue that requires additional consideration relates to the use of the phrases, "upon notification" and "notified the employer." As an initial matter, it is unclear whether these similar, though different, phrases mean the same thing. For the sake of clarity, one phrase should be selected and used consistently throughout to avoid confusion.

Second, the terms "notification" and "notified" are vague terms that should be modified to clarify what the employee is required to do before an employer's obligations are triggered. For instance, does the employee have to notify the employer in writing, or does a verbal conversation satisfy the employee's obligation to notify? Is the employee's own statement sufficient, or is it permissible for an employer to request confirmation from a third-party professional before it is required to amend its policies, procedures, or practices for the requesting individual? Are the employer's obligations to modify its existing policies triggered immediately upon notification? And if not, how soon is the employer required to act? Should the employee be required to provide sufficient lead time to allow the employer the opportunity to make adjustments as appropriate? And if so, how much time is necessary? These questions are not currently addressed in S. 811.

b. Who Is Covered by Sections 8(a)(3) and 8(a)(5)?

Sections 8(a)(3) and 8(a)(5) are applicable to only a subset of employees that are otherwise covered under ENDA. Specifically, these sections are applicable to those individuals that have "undergone" or who are "undergoing gender transition." Absent from ENDA, however, is a definition of the phrases "undergone," "undergoing," or "gender transition." These undefined phrases are particularly problematic given that "gender transition" is a broad term used to describe a combination of social, medical, and legal steps that an individual may, or may not, choose to undergo in their decision to define their gender identity.[54]

For instance, social steps in the process might include asking to be referred to by a different name or pronouns (i.e., "she" instead of "he" or vice versa).[55] Such steps may also involve an employee using clothing or accessories traditionally worn by individuals of the sex and/or gender the employee identifies with, or taking on mannerisms associated with a particular gender.[56]

Certain employees may also choose to take medical steps to further conform to their core gender identity. Such medical interventions may include hormonal therapies and/or surgery to further modify their physical appearance or attributes.[57] Finally, transitioning individuals may utilize courts or other agencies to achieve legal recognition of their new name and/or gender.[58] Thus, the term "gender transition" implicates a wide range of steps that employees may be said to have "undergone" or be "undergoing."

As previously stated, one of the social steps in the gender transition process may include the use of clothing, make-up, or accessories commonly associated with an individual's true identity rather than with his or her gender at birth. As currently written, "undergoing" may be so broadly interpreted as to cover any employee who presents in a gender non-conforming manner on a single day.

Such distinctions on issues that most employers may not fully comprehend may cause for significant concern and confusion in the employer community. Thus, defin-

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[52] S. 811, Section 8(a)(5) (emphasis added).
[53] *Id.* at Section 8(a)(3) and 8(a)(5).
[54] Transgender Visibility Guide: A Note on Transitioning, available at *http://www.hrc.org/files/assets/resources/transgender_visibility_guide.pdf*. (last viewed June 6, 2012); *see also*, The Transsexual Person in Your Life, Responses To Some Frequently Asked Questions/Frequently Held Concerns, available at *http://www.tsfaq.info/*. (last viewed June 6, 2012).
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*

ing more specifically those individuals who can make requests under sections 8(a)(3) and 8(a)(5) should be clearly defined in ENDA.

c. Do "Certain Shared Facilities" Include Restrooms?

Section 8(a)(3) implicates a common, yet controversial, issue related to transitioning employees. Specifically, which "certain shared facilities" should transitioning employees use, and when is it appropriate for these employees to begin using shared facilities designated for members of the "opposite sex." Though entitled "Certain Shared Facilities," Section 8(a)(3) provides only limited guidance on this issue. As written, it applies only to "shared shower or dressing facilities in which being seen unclothed is unavoidable."[59] In such shared facilities, an employer who has been notified that an employee has or is undergoing gender transition has the following two options: (1) to allow the transitioning employee access to the shared facilities designated for the gender to which the individual is transitioning; or (2) to provide the transitioning employee with "reasonable access to adequate facilities" that are not inconsistent with the gender to which they are transitioning.

Glaringly absent from ENDA, however, is guidance for employers with respect to bathrooms or restrooms. Indeed, far more prevalent in the workplace than "shared shower or dressing facilities in which being seen unclothed is unavoidable" are restrooms. The same privacy issues that give rise to the use of "shared showers or dressing facilities" are applicable to some bathrooms where being seen unclothed may also be unavoidable. Employers should be provided the same flexibility that S. 811 provides employers with respect to shared shower or dressing facilities by expressly permitting employers to decide which restrooms transitioning employees will have access to so long as they are permitted "reasonable access to adequate" restrooms.

Moreover, because the definition of "gender identity" in S. 811 is broader than the subgroup of individuals who have or who are undergoing gender transition, it should also be clarified to expressly State whether an employer has any obligation to allow anyone other than transgendered employees access to shared facilities that are designated for use by only members of one particular sex. Given that restroom accommodations may be perhaps one of the most controversial issues employers will be required to face if ENDA is enacted in its current form, congressional guidance on this point would be helpful to employers who will be required to implement policies, practices, and procedures consistent with ENDA. Clarity here is paramount because ENDA goes beyond the relatively simple concept of nondiscrimination in the workplace and instead imposes affirmative obligations on employers. Thus, any vagueness in the law could lead to significant damages awarded against well-intentioned employers who simply may not understand their obligations, as well as significant time-lags for these issues to be resolved through litigation.

d. Are Employers Required to Modify Existing Facilities Under ENDA?

Section 8(a)(4) of ENDA provides as follows: ADDITIONAL FACILITIES NOT REQUIRED—Nothing in this Act shall be construed to require the construction of new or additional facilities.[60]

Given the language in the text, it is clear that ENDA does not require an employer to construct new or additional facilities. Left unanswered, however, is whether employers are nonetheless required to *modify* existing facilities. Clarification concerning this issue is critical so as to have certainty with respect to the scope of an employer's obligations under ENDA.[61]

IV. CONCLUSION

In conclusion, I believe that the issues raised herein should be considered and addressed as the committee considers the Employment Non-Discrimination Act of 2011. Please do not hesitate to contact me if I can be of further assistance in suggesting ways in which to improve ENDA's language to ensure that it meets congressional objectives.

PREPARED STATEMENT OF HUMAN RIGHTS CAMPAIGN®, CHAD GRIFFIN, PRESIDENT

Mr. Chairman and members of the committee, my name is Chad Griffin, and I am president of the Human Rights Campaign®, America's largest civil rights orga-

[59] S. 811, Section 8(a)(3).
[60] S. 811, Section 8(a)(4).
[61] If ENDA were clarified to require an employer to undertake such affirmative obligations with respect to modification of existing facilities, it is critical to also provide guidance on when those obligations are triggered and when they must be completed.

nization working to achieve lesbian, gay, bisexual and transgender (LGBT) equality. By inspiring and engaging all Americans, HRC strives to end discrimination against LGBT citizens and realize a nation that achieves fundamental fairness and equality for all. On behalf of our over 1 million members and supporters nationwide, I am honored to submit this statement in support of S. 811, the Employment Non-Discrimination Act ("ENDA").

Work is a core part of our lives. Of course, it is most basically how we provide for our selves and our families. But it is also how we contribute to the life of our communities and our Nation. And if we are lucky, work is how we continue to learn, grow, challenge ourselves and, just maybe, realize our dreams. Even in difficult economic times, generation after generation of Americans have gone to work to build better lives for themselves and to show their children that they can be anything they want to be. That is at the very heart of the American dream.

The Employment Non-Discrimination Act is critical to protect both aspects of that dream—the chance, today, at a fair shake in the American workplace and the promise, tomorrow, that no young person must choose between being who they are and striving for their strongest aspirations. ENDA must be passed because, for too many LGBT people in this country, that dream remains out of reach. In 29 States, it remains perfectly legal to fire someone solely based on his or her sexual orientation, and, in 34 States, to do so based on gender identity. Without comprehensive Federal protections in the workplace, many LGBT people must go to work or a job interview unable to be fully themselves, hiding their families and home lives, in order to protect their livelihoods and careers. Like everyone else, these employees simply want to be judged based on their merits and rewarded for their accomplishments.

Instead, they face discrimination and unequal opportunities. For instance, studies show that sexual orientation has a negative impact on earnings among individuals with similar education and background. A 2007 survey of these studies found that gay men earn from 10 percent to 22 percent less than heterosexual men with the same education, experience, race, occupation and geographic location. A 2009 national survey of more than 6,000 transgender people found that 47 percent had experienced an adverse job action—firing, refusal to hire or denial of promotion—because of their gender identity, and nearly everyone surveyed (97 percent) had experienced some form of anti-transgender harassment or discrimination on the job.

But our Nation's failure to protect LGBT Americans in the workplace does not simply deny equal opportunity to those struggling to succeed in the workforce today. It tells young lesbian, gay, bisexual and transgender people that their futures are not as limitless as their peers'—that before they have even had a chance to dream, some doors are already closed to them. Earlier this month, HRC released a report entitled "Growing Up LGBT in America" based on a nationwide survey of more than 10,000 LGBT-identified young people. The survey starkly demonstrates how we are failing LGBT youth, who broadly encounter harassment, bullying, ostracism and rejection. And while they are also resilient, a large majority believes they must leave their hometowns to find happiness, compared to less than a third of their straight peers. Forty-one percent of LGBT youth believe they must move to a new city or town simply to have a good job. This should hardly come as a surprise when, in a solid majority of States, they face the very real possibility that their sexual orientation or gender identity might keep them from succeeding at work, or getting a job at all.

Our Nation owes these LGBT youth access to the same dream that we have promised generation after generation before—an equal chance to succeed, to reach higher than those who came before you. That promise has been denied to far too many people in our Nation's history. Over the years, we have worked hard to change that—not always perfectly, sometimes stumbling in the effort. But with laws like the Civil Rights Act of 1964 and the Americans with Disabilities Act, Congress has taken great strides to ensure that workers are judged on merit, not characteristics like race, gender and religion, which have nothing to do with someone's ability to do a job. By passing ENDA, Congress can remove one more barrier to ensuring that all Americans can succeed.

Fortunately, support for job protections for LGBT people is very strong among the American people and American businesses. Fairness is a fundamental American value, so it should come as no surprise that there has been majority of Americans supporting equal job opportunities for gays and lesbians for decades. Gallup has polled on this question regularly since 1978—when 56 percent of Americans already supported workplace equality—and in the last several years, support has reached 89 percent. It's rare that 89 percent of the American people agree on anything. Other polls have shown that this support crosses ideological and demographic lines. A 2011 poll conducted for HRC by Greenberg Quinlan Rosner Research found that 77 percent of Americans favor protecting lesbian, gay, bisexual and transgender peo-

ple from workplace discrimination, including 70 percent of Republicans, 67 percent of conservatives, 69 percent of seniors, 74 percent of born-again Christians and 72 percent of residents of the Deep South. A 2007 Hart Research poll showed strong majority support specifically for ENDA among white, African-American and Latino voters.

America's top companies and many small businesses also support equal employment opportunities for LGBT people, which is why corporate America has taken the lead on the issue of workplace equality. These successful employers know that in order to remain competitive in a global marketplace, they must recruit and retain the best possible talent, regardless of irrelevant characteristics like sexual orientation and gender identity. Currently, 86 percent of Fortune 500 companies have implemented non-discrimination policies that include sexual orientation. Half of those companies also cover gender identity in their policies—up from only three companies in 2000. More than 90 major corporations and almost 60 small businesses have joined the Business Coalition for Workplace Fairness, a group that actively lobbies Congress in support of ENDA. These companies represent a wide range of geography and industry, and include: Alcoa, American Airlines, BP America, Citigroup, Clear Channel Communications, Coca-Cola, Dow Chemical, Ernst & Young, General Mills, General Motors, Google, Kaiser Permanente, Marriot International, Microsoft, Nationwide, Nike, Sara Lee, Time Warner, Whirlpool and Xerox. Without any requirement under Federal law, these companies have taken affirmative steps to ensure that their LGBT employees have an equal chance to contribute and succeed. We applaud their leadership and urge Congress to follow suit.

As President of the Human Rights Campaign®, I am privileged to speak on behalf of our membership and the broader LGBT community, for individuals who do not have the chance to come before Congress and ask for the equal opportunity that they deserve. They are gay and lesbian breadwinners determined to keep a steady paycheck for the family at home that they can't talk about. They are transgender job-seekers with highly sought skills and experiences who face rejection after rejection because of who they are. They are young LGBT people who look around their hometowns and see no future for people like them.

On behalf of all of them, I urge you to pass the Employment Non-Discrimination Act. Over the past half-century, our Nation has moved steadily closer to making the American Dream a reality for all Americans. Congress and the President have recognized that race, sex, national origin, religion, age and disability are irrelevant to the ability of a person to do a job and have enacted laws to address discrimination based on those characteristics. These civil rights laws have improved job opportunities for millions of Americans, raising standards of living and providing hope of a better future for each successive generation. Congress must act to ensure that lesbian, gay, bisexual and transgender Americans have access to that same opportunity.

PREPARED STATEMENT OF THE LOG CABIN REPUBLICANS

EMPLOYMENT NON-DISCRIMINATION ACT AND THE FREEDOM TO WORK

Log Cabin Republicans[1] support passage of S. 811, the Employment Non-Discrimination Act (ENDA) because preventing discrimination in the workplace is not just the right thing to do—it's good for any business's bottom line and vital to the American economy as a whole. Joining with a coalition of major American employers, Log Cabin Republicans view ENDA as closely tied to the need for job creation and the conservative principles of hard work, personal responsibility and individual liberty.

Workplace discrimination, for any reason, is un-American, unfair, and unwise. The secret to our Nation's success in building the most qualified, dedicated, and competent workforce is our status as a free society, where people have the opportunity to pursue any career they wish, and the ability to succeed or fail based on their own efforts, merit, and good fortune. Unfortunately, that foundation for our national success is undermined when millions of lesbian, gay, bisexual and transgender (LGBT) Americans fear that they may lose their jobs due solely to their sexual orientation or gender identity.

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[1] Log Cabin Republicans is the only Republican organization dedicated to representing the interests of lesbian, gay, bisexual and transgender (LGBT) Americans and their allies. The 30-year old organization has State and local chapters nationwide, a full-time office in Washington, DC, a Federal political action committee and State political action committees. Log Cabin works to build a stronger, more inclusive Republican Party by promoting the core values of limited government, individual liberty, personal responsibility, free markets and a strong national defense while advocating for the freedom and equality of LGBT Americans.

Today, 4.3 million LGBT Americans live in the 29 States without basic protections from workplace discrimination. Especially in a job market distinguished by high unemployment and underemployment, the fear of losing a paycheck for being gay or transgender is very real. This fear translates into significant losses in workplace productivity, leading some to say that "discrimination is a tax on the American economy."[2]

Leaders of the private sector know that nondiscrimination is good for business, and many businesses are taking active steps to make all employees feel valued and welcome. Among Fortune 500 companies, 86 percent have non-discrimination policies that include sexual orientation. Even Wal-Mart, which defines conservative old-fashioned American values, safeguards workers from discrimination and harassment based on both sexual orientation and gender identity.

While the progress made by American companies like Lockheed Martin,[3] General Mills and Sarah Lee is real, so is the potential for harm from lingering anti-gay bias. Many LGBT Americans still report experiencing direct employment bigotry, and a full 25 percent say they are not comfortable "being myself" at work. We live in a fast-moving economy where communication and teamwork are vital. The detachment and emotional burden of the closet are a drag on American excellence, productivity, and freedom that we simply cannot afford. Like the military's former "Don't Ask, Don't Tell" policy, workplace discrimination is detrimental to productivity, and there are serious negative ramifications when employees feel forced to live a redacted life, carefully guarding every word and gesture, unable to confide in their colleagues or lying out of fear of losing their job.

The complexity of the American economy and the patchwork nature of current LGBT protections also speak to the need for Federal employment non-discrimination legislation. The freedom to work is hindered when an employee can be hired in one State with legal assurance that they will not be discriminated against for who they are, and then faces being transferred to a new office in a State where he and his family run the risk that his career could be ended due to anti-LGBT discrimination. Likewise, the inconsistent and complicated nature of legal employment protections, which can vary State by State or even by municipality within States, places a burden on employers. After the recent U.S. Equal Employment Opportunity Commission determination that Title VII of the Civil Rights Acts of 1964 covers gender identity, there is a real need for clarity that ENDA would provide once and for all.[4] It is significant that the National Federation of Independent Businesses and the U.S. Chamber of Commerce, which as a rule are staunchly opposed to any invasive or harmful regulation of businesses, are neutral on ENDA.

ENDA enjoys a long history of bipartisan support in both the House and Senate, and Log Cabin Republicans are grateful for the leadership of Senators Susan Collins (R–ME), Mark Kirk (R–IL) and Olympia Snowe (R–ME) in promoting this important legislation, and for recent Statements by Republican National Committee Chairman Reince Priebus in support of "equal rights in regard to discrimination in the workplace." This Republican support extends to the American population at large, with recent polls showing that significant majorities of Republicans (66 percent) and independents (74 percent) support workplace nondiscrimination laws for LGBT Americans.[5] Republicans support it, businesses support it, and LGBT Americans need it. It is time to pass ENDA.

PREPARED STATEMENT OF THE NATIONAL GAY AND LESBIAN TASK FORCE ACTION FUND, REA CAREY, EXECUTIVE DIRECTOR

Mr. Chairman, Vice-Chairman, and members of the committee, we thank Chairman Harkin and the committee for holding a hearing on the Employment Non-Discrimination Act (ENDA), S. 811. On behalf of the National Gay and Lesbian Task Force—the oldest national organization advocating for the rights of lesbian, gay, bisexual and transgender (LGBT) people—we urge you to support this critically important legislation. Hard work and fair treatment are core American values and no American should be denied the opportunity to work because of factors unrelated to job performance.

Improvements in the Nation's current economic crisis hinge on the talents and expertise of a fully functioning workplace. An analysis of Census 2000 data shows a

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[2] Ken Charles of General Mills, June 12th before the Senate HELP Committee.

[3] *http://communities.washingtontimes.com/neighborhood/politics-and-pride/2012/mar/19/military-lockheed-martin-glbt-inclusiveness/*.

[4] *http://www.washingtonblade.com/2012/04/24/eeoc-ruling-on-trans-rights-triggers-new-call-for-enda/*.

[5] *http://www.freedomtowork.org/?page__*id=39.

strong link between thriving tech-oriented economies and diverse populations, including those with high LGBT populations. Workplace equity encourages regional growth centers, as top-notch employees have migrated to centers where they can be assured that their talents will not be suppressed due to legal inequities and arbitrary prejudices. ENDA will grow our communities and ensure that all Americans have an equal playing field as they seek to secure a livelihood for their families.[1]

Currently, the playing field is far from even. Analyses of existing studies and new data suggest that up to two thirds of LGB people—and nearly all transgender people—have experienced employment discrimination. ENDA is essential to addressing this widespread problem.

LGBT AMERICANS FACE HIGH LEVELS OF EMPLOYMENT DISCRIMINATION

Over 50 studies of discrimination against LGB people have established that they face significant barriers to equality. Fewer studies have been conducted about discrimination against transgender people; our work surveying 6,450 transgender and gender non-conforming people about gender identity-based discrimination in the workplace begins to fill that gap. Further research is needed, particularly the inclusion of sexual orientation and gender identity in population-based surveys of the workforce, such as the Bureau of Labor Statistics surveys.

Discrimination against lesbian, gay, bisexual and transgender people in the workplace persists despite the increasing visibility of these communities and improved local and statewide protections against anti-LGBT prejudice and violence.

A 2007 meta-analysis by the Williams Institute of 50 studies of workplace discrimination against LGBT people found consistent evidence of bias in the workplace. Critical concerns such as overt discrimination, firing, denial of promotion or negative performance evaluation (based on bias) ranged as follows:

- 16 percent to 68 percent of LGBT people report experiencing employment discrimination;
- 8 percent to 17 percent were fired or denied employment;
- 10 percent to 28 percent were denied a promotion or given negative performance evaluations;
- 7 percent to 41 percent were verbally/physically abused or had their workplace vandalized;
- 10 percent to 19 percent reported receiving unequal pay or benefits.

These stark realities, often minimized as a problem of subjective "self-reporting," have been confirmed in a study that surveyed observations of heterosexual co-workers. Researchers querying heterosexuals about witnessing discrimination against their LGB peers found that 12 percent to 30 percent of respondents in certain occupations, such as the legal profession, have witnessed anti-LGB discrimination in employment.

Discrimination and attendant loss of income and benefits can lead to poverty for LGB people over their life-span. According to the Williams Institute, lesbian couples have a poverty rate of 6.9 percent compared to 5.4 percent for opposite-sex married couples and 4.0 percent for gay male couples. Outcomes are more severe when we examine LGB families. When we calculate the poverty rates for families comprised of two adults and their children, the poverty rate for lesbian families is 9.4 percent compared to 6.7 percent for those in opposite-sex married couple families and 5.5 percent for those in gay male-coupled families. In general, lesbian couples have much higher poverty rates than either opposite-sex couples or gay male couples. Lesbians who are 65 or older are twice as likely to be poor as heterosexual married couples.

Poverty rates for children of same-sex couples are twice as high as poverty rates for children of opposite-sex couples. Although gay and lesbian couples are less likely to have children in their households than are heterosexual married couples, children of same-sex couples are twice as likely to be poor as children of married couples. One out of every five children under 18 years old living in a same-sex couple family is poor, compared to almost 1 in 10 (9.4 percent) children in opposite-sex married couple families. The research points to the negative outcomes of discrimination for LGB people and refutes the common misconception that gay people have more dis-

[1] Gates and Florida, 2002. The link between diversity and economic success was first proposed in a paper that examined 5 urban centers with the largest LGBT population—San Francisco, Washington, DC, Austin, Atlanta and San Diego. Richard Florida's research in this arena suggests a strong linkage between equal justice in the workplace and creativity and success within companies and communities.

posable income than others. Workplace discrimination negatively affects the entire family.[2]

NATIONAL STUDY FINDS RAMPANT WORKPLACE DISCRIMINATION

The Bureau of Labor Statistics fails to ask sexual orientation and gender identity questions in its annual data collection efforts, making it impossible to get randomized data on LGBT people's experiences of workplace discrimination. Instead, the work of chronicling the community's experiences of bias has been left to community-based organizations and a handful of pioneering researchers and institutes. While the data on discrimination against LGB people is relatively scarce, there have been even fewer studies on the workplace experiences of transgender Americans.

To address this gap, in a joint effort with the National Center for Transgender Equality, the Task Force recently published Injustice at Every Turn: A Report of The National Transgender Discrimination Survey, which documents the discrimination transgender people experience in employment, education, health care, housing, public accommodation, criminal justice, family life, and access to governmental documents. Over a 6-month period, we surveyed 6,450 transgender people throughout the United States via an extensive questionnaire, including people in every State as well as Washington, DC, Puerto Rico, Guam, and the U.S. Virgin Islands. Until this study, data on the prevalence of discrimination against transgender people has been limited to small studies and anecdotal reports.

Our key finding is this: the state of the workplace for transgender Americans is absolutely shameful.

Discrimination in employment against transgender people is a nearly universal experience.

- Ninety percent (90 percent) of our sample reports mistreatment or discrimination on the job or taking actions like hiding who they are to avoid it.
- Nearly half (47 percent) lost their jobs, or were denied a job or promotion as a direct result of being transgender. These statistics are alarming and have multiple, spiraling negative effects on quality of life.

Transgender Americans face twice the rate of unemployment (14 percent) as the general population for our sample during the time of the study (7 percent). Black transgender people reported nearly four times the rate of unemployment as the general population (28 percent), while Latino and multi-racial transgender people experienced nearly three times the rate of unemployment.

High unemployment had predictably detrimental effects on income, with participants in our study experiencing twice the level of extreme poverty as those in the general population. Census figures for 2005–7 show 7 percent of the general population living on incomes at or below $10,000 while our study found 15 percent in this income category. Transgender people who lost a job due to bias were six times as likely to be living on an annual household income under $10,000 (24 percent) as the general U.S. population (4 percent). Again, transgender people of color struggle with poverty at significantly higher rates, with 23 percent of multiracial transgender people living on $10,000 or less, Latinos/as at 28 percent, and African-American transgender people at an outrageous 34 percent. In response to high levels of employment discrimination, many transgender people resort to underground economies like sex work and drug sales to survive. In our sample 16 percent said they had been compelled to engage in underground employment for income and 11 percent turned to sex work to survive.

Future employment success is also impacted by the discrimination that respondents experienced in educational settings. Those who reported mistreatment in school were 50 percent less likely to earn $50,000/year than the general population. Our study also found that leaving school because of intolerable harassment was associated with future unemployment. Nineteen percent (19 percent) of those who had to leave school because of harassment reported being unemployed as compared with 11 percent of those who did not. Physical abuse in school settings also had significant impact on future employment, the lack thereof, or participation in underground economies like sex work and drug sales. Those who were physically attacked in school were far more likely to stay in a job they would prefer to leave (64 percent) compared to those who were not (42 percent). Similarly, 47 percent of those who were physically assaulted in school "did not seek a promotion or raise" in order to avoid discrimination as opposed to 27 percent of those who were not. Perhaps most notable, 32 percent of those who were physically assaulted at school also reported

[2] The Williams Institute: *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination, 2007 and Poverty in the Lesbian, Gay, and Bisexual Community, 2009.*

doing sex work or other work in the underground economy as compared to 14 percent of those who were not assaulted. Thirty-nine percent (39 percent) of those who had to leave school "because the harassment was so bad" reported doing sex work or other work in the underground economy. Experiences of discrimination and abuse in school settings can and do reflect the discrimination perpetuated in future employment.

Even when transgender people resiliently pursue traditional tools of economic advancement like education, rampant discrimination prevents them from earning requisite incomes. Despite the fact that 27 percent of our sample attained a college degree and 20 percent went to graduate school or received a professional degree, educational attainment did not protect respondents from experiencing poverty. Our sample is 4–5 times more likely than the general population to have a household income of less than $10,000 per year at each education level. For example, 8 percent of those who achieved a bachelor's degree or higher in our sample still made less than $10,000/year as compared to only 2 percent of the general population, and 42 percent of our respondents who did not have a high school diploma made less than $10,000 per year as compared with 9 percent of the general population without a high school diploma. The study's findings of higher levels of poverty, incarceration, homelessness, and poor health outcomes among respondents demonstrate the power of anti-transgender bias to overwhelmingly outweigh educational attainment designed to increase employment opportunities.

Survey respondents experienced a series of devastating negative outcomes, many of which stem from the discrimination they face in employment. A large percentage of our sample experienced negative impacts on their housing security as a direct result of their gender identity, with almost one-fifth of respondents becoming homeless because they are transgender. Additionally, respondents who had lost a job due to bias were four times more likely to have experienced homelessness due to bias (40 percent) than those who did not lose a job due to bias (10 percent). Of the 19 percent of respondents who experienced homelessness, 29 percent were denied access to a shelter because they were transgender or gender non-conforming. This trend is even more devastating for Latina/o and Black respondents who reported 45 percent, and 40 percent denial of access to homeless shelters, respectively. The tremendous impact of employment discrimination reaches into the most fundamental aspects of transgender people's lives.

Employment issues also impact transgender people's access to health care. Transgender and gender non-conforming people do not have adequate health insurance coverage or access to competent providers. Respondents in our sample are more likely to be uninsured (19 percent) than the general population (17 percent) and only 51 percent of the sample enjoys employer-based insurance coverage, compared to 58 percent of the population at large. Not only were respondents less likely to be insured, but individuals with the highest rates of postponing care when sick or injured included those who have lost a job due to bias (45 percent). Another barrier to meaningful health care access, the study reflects, is that 50 percent of respondents had to teach their medical provider about transgender care. These figures underscore how employment discrimination often leads to unemployment or severe under-employment, which creates multiple liabilities for our sample.

These statistics and the remainder of the NTDS study reflect that transgender people face injustice and discrimination in acquiring, sustaining, and advancing in meaningful employment. Without work, transgender people are at the mercy of public accommodation and support systems that are unwelcoming at best, and more often, actively hostile.

ENDA BENEFITS REAL PEOPLE

As the National Transgender Discrimination Study and those of the Williams Institute demonstrate, employment discrimination against LGBT people is more prevalent and widespread than ever imagined.

Our mandate today is clear: employment protections are paramount.

Because the law protects LGBT people in only 44 percent of the country, and many of the protections are in the form of hard-to-enforce local laws, there is unfortunately very little LGBT people can do to seek redress. Where there are laws and complaint processes, LGBT employees are often reluctant to utilize these processes because they must "out" themselves to members of the community or to future employers when they file official complaints, thus further exposing themselves to continued discrimination and retribution.

ENDA is crucial because it will create a Federal standard that imposes a baseline of respect and equal treatment for LGBT people, while specifically addressing a des-

perate need for protections for transgender people in the workplace that are demonstrated by our survey data.

ENDA recognizes that a person's sexual orientation or gender identity bears no relationship to their work performance and provides the same protections for sexual orientation and gender identity that all people receive for race, color, religion, sex, and national origin under Title VII of the Civil Rights Act. ENDA does not give special protection; it covers heterosexual and non-transgender people if they are discriminated against as well.

Nevertheless, those who are the most likely to benefit from this legislation are members of the LGBT community. Nearly every type of employer regularly engages in discrimination: there is no sector, private or public, technical, skilled or unskilled, in which LGBT people are safe from discrimination. In their capacities as employers, State governments have acted as every other employer by engaging in widespread patterns of employment discrimination against LGBT employees and applicants. When 90 percent of transgender people experience mistreatment and harassment in employment and report rampant unemployment and underemployment, as our study demonstrates, it is clear that no employment sector is blameless.

Below are a few examples of the employment discrimination and problems with underemployment that lesbian, gay, bisexual, and transgender people have endured in the workplace simply for being who they are.

Public Sector Employment Discrimination

Laura Calvo

Laura Calvo, a transgender woman in her 50's who resides in Portland, OR, worked for the Josephine County, OR Sheriff's Office for 16 years as a Deputy Sheriff and Sergeant. During the course of her employment, she served in many capacities: shift supervisor, Sheriff Sub-Station Commander, Detective in the Major Crimes Unit, Detective in the Josephine County Interagency Narcotics Task Force, S.W.A.T. team leader and Commander. Laura remained closeted in the workplace because she wanted to carry on a responsible career where she could contribute to society and knew if her transgender status was discovered she would be terminated. In October 1996, Laura Calvo was the victim of a burglary and many of her personal belongings were stolen. In the course of the recovery effort her transgender identity was discovered by her employers. She was called into her supervisor's office and told she could not retrieve her belongings because they needed to be examined for evidence of violations of department policy and potential crimes. She was then ordered by her supervisor to undergo a psychiatric determination for fitness of duty to return to work. The panel of doctors, selected by the Sheriff's office, determined she was not fit to return to duty. Laura was told that she could not return to work and that the Sheriff thought she was a "freak." Laura was then forced to resign. *Source:* Testimony to the Oregon State Senate, 2007.

Alexandra

Prior to Illinois passing a gender identity inclusive non-discrimination law in 2002, Alexandra*, a transgender woman, worked in an Illinois State government office at the College of Lake County in Grayslake, IL. She transitioned from male to female at work with the help of her therapist who met with staff and supervisors. At this meeting, Alexandra's supervisors told her to continue to use the men's restroom. After the meeting, her supervisor and co-workers persisted in calling her by her male name and referring to her as "he." Alexandra voiced her issue with this, asking to be treated as the woman she had transitioned to become. She was told by her supervisor that she was acting confrontationally. This "confrontationalism" was cited as a reason Alexandra needed to improve her personal relations at work. The supervisor claimed that the staff is trying to make "adjustments" for Alexandra, but the supervisor was one of the biggest culprits who continued to call Alexandra by male pronouns. Alexandra went to the steward of her union to ask for assistance in this matter, but even the steward did not want to help. Now, Alexandra believes she may have to get her own representation to deal with discrimination she has faced in the workplace. *Note: This is not the true name of the victim to protect her privacy.

Source: 6th Report on Discrimination and Hate Crimes Against Gender Variant People. It's Time, Illinois . . . Political Action for the Gender Variant Community, Spring 2002

Ronald Fanelle

Ronald Fanelle taught seventh and eighth graders at a California middle school. The other faculty and the principal knew that Ronald was gay, but his students did not. A month after Ronald and his partner were married in February 2004, his co-

workers congratulated him at a staff meeting. Then a teacher told his students that Ronald had gotten married to a man over the weekend and the news spread around the school. Ronald's students asked if it was true that he married a man. Ronald told them it was true.

In the following weeks, one parent, a personal friend of the school board president, vocalized his opposition to a gay man teaching in the school and arbitrarily accused him of bringing "his homosexual agenda into the classroom." The school hired a private investigator to investigate the situation and Ronald's background. Nothing damaging emerged. Ronald, however, received hate mail on his school e-mail account and dozens of viruses were sent to the district, which shut down its system. Ronald was instructed in writing to open a private e-mail account in order for parents and students to communicate with him.

In the following year, a few students created an anti-gay Web page that ridiculed Ronald. Offensive stickers relating to Ronald's sexual orientation were posted all over the school. The principal called a meeting prior to the new 2006–7 school year. In the meeting, the principal made disparaging comments to Ronald in front of another principal, the union president, and the district's superintendent of personnel. His principal went on to tell Ronald: "Your problem is you're angry because no one will accept your gay marriage!"

The school district then began interrogating students about Ronald. The students reported that Ronald did not talk about his personal life and he was well-liked. A week later, the superintendent of personnel formally disciplined Ronald for "inappropriate e-mail communication" with students and parents because Ronald was sending e-mail from a private e-mail account instead of his school account. Ronald was only using a private account because the school had shut down his school account, due to the amount of hate mail and viruses. Over 3 years, four students were removed from Ronald's classroom because their parents disapproved of his sexual orientation. The district's response to Ronald was simply stated as: "It's a conflict of family values." In February 2007, due to the principal's and the district's harassment, Ronald took an extended sick leave.

Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007.

Alynna Lunaris

Alynna Lunaris, a transgender woman from Maryland, was employed at the Washington Humane Society (WHS), a non-profit that receives a government contract from the District of Columbia for animal control services. She was first hired by WHS in January 2005 as a front desk assistant at the District of Columbia Animal Shelter where she was quickly promoted to the Animal Control Officer position. In June 2006, Alynna began taking hormones and making other steps as part of her transition from male to female in all areas of her life. In September 2006, she took a vacation and, informed management that she would be returning as a woman. When she returned, Alynna submitted a court order showing her change of name, as well as a copy of her new driver's license, which designated her as a female. Within 2 weeks of her return, however, she experienced discrimination from WHS management. This began when a promotion to Field Services Supervisor became available. WHS management had initially asked Alynna to apply for a Field Services Supervisor position only to be told later that her application would not be considered.

Over the next 5 months she suffered discriminatory conditions fostered by two managers. The managers continually referred to Alynna using male pronouns and were otherwise hostile toward Alynna. The situation escalated to the point where WHS transferred her to a position in the private law enforcement department that was not under the control of those two managers. Alynna worked for the next 6 months without incident, receiving many compliments on her work. Things were going well until the executive director left his position. One of the managers who had unfairly treated Alynna in her previous position was promoted to interim executive director. Upon the manager's promotion, the harassment and discrimination began again. Within 3 months, Alynna was fired from WHS by e-mail after management had filed several fabricated incident reports against her. Alynna has filed a complaint with the District of Columbia's Office of Human Rights which enforces the city's transgender-inclusive nondiscrimination law and has recently received preliminary findings related to probable cause. The appeals process is underway.

Source: Testimony to the Maryland House of Delegates, February 25, 2009 and Senate, March 3, 2009; Conversation between Thomas Bousnakis, Task Force Fellow and Alynna Lunaris, 2009.

Private Sector Discrimination

Linda Czyzyk

Linda is an attorney and her partner is a college professor who teaches biology and genetics. The couple lived in North Carolina and Linda worked at a law firm where she was openly gay. When Linda's partner accepted a faculty position at a university in Virginia, the couple needed to relocate to Virginia.

In August 2000, Linda had a phone interview with a law firm in Virginia and was invited for a second interview at the firm's office. During the interview, the firm repeatedly asked her why she was moving to Virginia. Linda replied that her spouse had taken a position at a local university, making sure that she avoided using pronouns. The law firm asked Linda to come back for a third interview, but this time she was told to bring her spouse because the interview would include a dinner with all the partners and their spouses "to make sure we all got along."

Linda told the only female partner at the law firm that her spouse was a woman. The female partner said that was fine by her, but she would have to inform the other two partners at the firm. After talking to the male partners, the female partner called Linda back to tell her that the male partners said the firm would not hire a lesbian and Linda should not bother coming to the third interview.

Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007.

Tony

Tony*, a transgender man, was employed for 13 years by a nightclub in San Francisco, CA, a State that includes gender identity in its employment non-discrimination law. Tony informed his employers that he is transgender and his direct supervisor began egregiously harassing him. Tony's supervisor repeatedly asked Tony inappropriate questions about his body and his sexual preferences. The supervisor refused to address Tony with male pronouns and often made comments to Tony such as, "You are not a real man." Tony was demoted from a high level management position to a low level service position and his pay was severely cut. He became incredibly depressed. The harassment escalated over many months and finally culminated in an incident wherein Tony's supervisor chased Tony in the club calling him a "freak" and a "b**ch" and threatening him with physical violence. Tony could no longer handle the harassment and was forced to quit his job. Tony brought a lawsuit against his former employer under California's Fair Employment and Housing Act, which bars discrimination based on gender identity, and reached a favorable settlement. *This is not the true name of the victim to protect his privacy.

Source: Transgender Law Center, Kristina Wertz, Legal Director.

Juan Moreno

Juan is a Latino community college student studying nursing who also works to help support his single mom and teenage sister. Juan applied for a part-time job at a local fast food restaurant where his friend worked. He interviewed with a shift manager in February 2007. He had a successful interview with the shift manager who told Juan's friend that Juan would work out. The shift manager recommended to the store manager that Juan be hired. The store manager knew Juan was friends with a current employee and had seen Juan come into the store to visit his friend. The store manager asked Juan's friend: "Is he into men or women?" Juan's friend informed the store manager that Juan was gay, but then asked, "what does that have to do with hiring him?" The store manager replied: "I'm the head manager and I can do what I want to do." Juan was not hired.

Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007.

Jacqui Charvet

Jacqui Charvet, a transgender woman, worked for 10 years as a consultant in computer technology with a firm with clients in the New Jersey and New York areas, with 16 years of computer technology experience that preceded her years as a consultant. Numerous consulting clients were within the State of New Jersey Government Departments, including with the NJ Department of Health, NJ Department of Treasury, and NJ Department of Human Services. Jacqui let her supervisor know that between assignments she planned to undergo gender transition, and at the next assignment would be coming to work as her new gender, including using her new name, (Jacqui), dressing as other women employees, and that female pronouns would be appropriate for her at that point. She planned to transition between assignments to keep the process as smooth as possible. However, instead of supporting her transition, her supervisor laid her off, refusing to assign her new work.

For the next 3½ years, Jacqui was unable to find a job in the public or private sphere in New Jersey. Upon discovering she was transgender, many potential employers turned her away. Interviewers for one position told Jacqui that they wanted to hire a "real man" for the position. With 26 years of total work experience, and 10 years as a consultant at the firm that "laid" her off, Jacqui found she was forced to leave to find employment with a private company in Florida that hired her after a phone interview.

Source: Conversations between Task Force staff and Jacqui Charvet, 2008 & 2009.

Brooke Waits

Brooke worked as the inventory control manager for a cell phone vendor. In the 4-months Brooke worked for the company, her supervisor continually praised her work. Brooke was not out as transgender to her co-workers at the store. She was quiet and kept to herself because she did not fit in with female coworkers and the male coworkers told a lot of lesbian jokes. In an effort to avoid controversy, Brooke did not say anything when her co-workers made anti-gay jokes and derogatory comments.

In May 2006, Brooke's manager approached Brooke's desk to ask her a question. Brooke was on the other side of the room sending a fax. Brooke's manager picked up Brooke's cell phone off of her desk, opened it, and then exclaimed "Oh my goodness!" Brooke's manager had seen the screen saver inside Brooke's cell phone, which was a picture of Brooke and her partner sharing a New Year's Eve kiss. Brooke's manager immediately left the room and did not speak to Brooke for the rest of the day. Later, Brooke overheard the manager tell another co-worker, "I knew there was something off about her."

When Brooke arrived at work the next day, her manager asked to speak with her immediately and fired Brooke. When Brooke asked why, the manager told her that they needed someone more "dependable." Brooke told the manager that she was dependable and, in fact, had been coming to work an hour early every day to work on implementing the new inventory system. The manager replied: "I'm sorry, we just need to let you go."

Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007.

Dylan Scholinski

Dylan Scholinski, a transgender man, lives on the edge of poverty despite holding a master's degree and writing an award-winning memoir of his institutionalization as a teenager for "gender identity disorder." Dylan was forced into "treatment" from the ages of 14–17 that included mandatory make-up sessions and the wearing of skirts and other traditionally feminine attire to "cure" him of his gender identity. Now in his 40's, despite having experienced life-long depression as a result of abuse from teachers, medical providers and mental health professionals, Dylan has never qualified for disability as is commonly available to people with PTSD and debilitating depression. Dylan currently runs a free teen suicide prevention arts program out of an art studio in Denver, CO. He is not compensated for his work, despite serving hundreds of LGBT youth struggling with gender identity and sexual orientation issues. Having lived his youth in enforced isolation and torment, he is committed to creating a safe space for LGBT youth in his community. Dylan continues to search for sustainable income to no avail.

Source: Conversation between Jaime Grant, Ph.D, Task Force Policy Institute and Dylan Scholinksi, 2009.

Janice Dye

Janice worked as a mechanic in an oil change service center in San Diego. Janice got along well with the other mechanics at the service center, who were excited to have a female mechanic working with them. Janice was out at work and her girlfriend occasionally brought her lunch. The service center's management, however, was not supportive of Janice. Janice was the only female mechanic in the shop, as well as the only African-American and lesbian employee.

In 1997, Janice applied for a 3-month training program to become an assistant manager. At the end of the training program, she had to take timed tests. Janice was fired because she could not complete an oil change in less than 10 minutes. However, management made her do the oil change alone, even though the usual procedure was to use two workers to complete an oil change (one in the ground pit below the car, and one on the ground floor at the car's hood). Janice's coworkers told her that they heard managers in the break room saying: "we won't let that lesbo-bitch get that job."

After being fired, Janice left the service center and started to work at another location owned by the same company. She hoped she would not be discriminated against at the new location, but the managers treated her the same. She had to take the same test of completing an oil change in 10 minute and, again, she had to do the oil change alone (taking time to run up and down the stairs to the pit below the car). Management did not even let her finish the oil change because she had gone over the 10-minute limit. After 10 minutes, the manager yelled: "time's up" and "you're fired."

Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007.

Michelle Hansen

Michelle Hansen is an Episcopal priest and computer industry trainer who lives in Connecticut. Michelle worked successfully at a medium-sized computer repair and training company for nearly 18 years, the latter part of her time as the company's senior technical trainer. In June 2004, a week after notifying her employer of her plans to transition from male to female, she was terminated from her job. Michelle's employer claims to have terminated her for economic reasons; however, the company had recently hired two other employees who were not fully trained or certified. Michelle has two Master's degrees from Yale University and a long list of certifications in the computer industry, but she has not been able to find employment since being terminated several years ago.

Source: Testimony to the Judiciary Committee of the Connecticut General Assembly, 2009.

Brad Nadeau

In April 2002, an insurance company in Bangor, ME employed Brad as a receptionist. After about a month, Brad was called into a meeting for his performance review. All of his work was rated satisfactory—he was not told that any areas of performance needed improvement. In fact, Brad trained a new employee who was hired a couple weeks after he was hired. Brad was not out at work because he was concerned that if he was honest about his sexual orientation, he might lose his job.

On June 2, 2002, Brad's partner picked him up at work and they went out for lunch together. When his partner brought him back to the office, they kissed goodbye in the parking lot. Brad noticed that an agency executive saw their kiss. The very same day, Brad was called into a meeting with his supervisor and the executive. His supervisor told Brad that he was being fired because his work was not satisfactory, despite his positive performance evaluation and the fact that he had over 4 years of office and administrative work experience.

Brad's termination seems to have violated company policy. The company policy states that the company is "committed to providing a work environment that is free of discrimination." The company also has a policy of progressive discipline, which the company states is "intended to give employees advance notice, whenever possible, of problems with their conduct or performance in order to provide them an opportunity to correct any problems." Regardless, the company did not give Brad any warning before they fired him.

Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007.

Kim Dower

Kim Dower is a transgender woman who is employed as a pharmacist in Colorado. After working for 9 years as a pharmacist, Kim told her employer of her future plans to transition from male to female. In March 2004, Kim was ready to start coming to work as herself, but her employer informed her that she would not be allowed to work at the pharmacy unless she continued to dress as a man. In effect, this would block her from transitioning to her new gender at work. In response, Kim filed a claim under Denver's anti-discrimination ordinance. She was given a preliminary ruling in her favor. However, this only resulted in mandatory mediation. In this mediation, Kim's employer refused to allow her to present as a woman unless she signed a nondisclosure agreement that would prevent her from telling anyone that she had won her case and that people in Denver do have the right to transition gender at work. Kim, wanting to be able to share her story so that other transgender people would know they have rights to transition and dress as themselves at work, refused to agree to the gag order. An entire year passed with her employer threatening to fire her if she came to work dressed as herself. Eventually, with great trepidation, she came to work dressed as a woman hoping that her employer would choose not to fire her as they had threatened. To Kim's surprise the employer did not take action against her. All in all, it was a terrible year for Kim,

unsure that the local law would be strong enough to protect her if she came to work as her true self.

Source: Testimony to the Colorado Civil Rights Commission, July 30, 2009.

John Schumacher

John is a Marine veteran who worked the overnight shift as stocker and "four star" cashier at a large retail store in Michigan's Upper Peninsula. In 3 years on the job, he was named "Associate of the Month" four times. He is the primary breadwinner because his partner has a disability. He and the cashier supervisor carpooled to work everyday. At the time, the cashier supervisor was not John's supervisor because John worked in the stockroom. After 3 months of carpooling, John told the cashier supervisor he was gay and she immediately began treating him coldly.

For several months, John was ignored by the cashier supervisor and he went about his business. But when John was promoted to cashier, the cashier supervisor became his direct supervisor. "It was hell, starting off the bat," John said. The cashier supervisor treated John differently than the other cashiers. She assigned John stocking tasks in the shelves around the checkout lanes then yelled at him for leaving his register. This pattern of treatment continued over time. John complained to the head manager to no avail; each night the cashier supervisor would find a new way to make it more difficult for John to do his job.

On February 5, 2007, John came to work and realized he forgot to bring lunch. John called home and asked his partner to bring something for lunch. His partner brought him a frozen dinner from home. John ate the dinner in the break room in view of other workers and the cashier supervisor. Two weeks later, John was accused of stealing a frozen dinner from the store's grocery section. He was not able to produce a receipt for the frozen dinner because he and his partner had bought it weeks before and did not save the receipt. He was fired on the spot.

Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007.

Ethan St. Pierre

Ethan St. Pierre, a transgender man from Massachusetts, was a respected security junior manager at Barton Protective Services, overseeing 30 employees that staffed the East Coast offices of Sun Microsystems. He was hired by Barton in 2001 and received numerous favorable performance evaluations and a number of corresponding pay raises. In 2002, he talked to his direct supervisor at Barton and the Sun Microsystems security manager that interfaced with him at Barton about his desire and intention to undergo a gender transition from female to male, and generally he was received favorably. When the time was right, an announcement was made to the 30 employees Ethan supervised that Ethan was now going to be Ethan and would be going by male pronouns. All of his 30 employees treated him with respect, including using his new name and male pronouns. All was fine for 6 months, until the senior Sun Microsystems manager interfaced with Ethan for the first time since his transition. Following this interaction, The Sun Microsystems senior manager slowly whittled away Ethan's responsibilities. In the meantime, Ethan's supportive manager at Barton was replaced by someone who did not respect Ethan. This new manager told coworkers, including Ethan's supervisees, that he did not agree with Ethan's "lifestyle." One day, this manager informed Ethan that he was being removed from his position at Sun Microsystems because the senior manager did not believe Ethan could do the job because of his gender transition. Ethan repeatedly asked to be assigned to another of Barton Protective Services' clients, but to no avail. Ultimately, he had to seek unemployment benefits. Ethan's attempts to find other jobs in the security field failed because Barton provided an unfavorable job performance review. Ethan was never able to find another job in the security field after this experience.

Source: Testimony of Ethan St. Pierre to the Massachusetts Legislature, available at: *http://www.masstpc.org/publications/legis/StPierreFiring.pdf*.

Jacinda Meyer

Jacinda is Latina and a licensed life and health insurance agent in California. She worked for a company that administers employee benefits to client companies. After she worked at the company for 9 months, she received positive feedback about her job performance and was given a raise. Her supervisors even gave her handwritten cards to thank her for her good service, teamwork, and positive attitude.

Throughout her tenure at the company, Jacinda's supervisors made several derogatory comments about lesbians. One of Jacinda's supervisors "warned" her before a meeting that the client was a lesbian and said: "I'm telling you now so you don't freak out when you see the pictures of two women on her desk." Jacinda did not

respond to this comment but later told another of her supervisors about the conversation. That supervisor asked: "Do you swing that way?" Jacinda replied that she was gay. The supervisor said: "Well, I'm fine with it as long as you don't kiss or hold hands in public."

Soon after Jacinda came out to her supervisor, the owner of the company approached her and told her about a book, *The Road Less Traveled*, which helped his son, who was a recovering drug addict. Jacinda interpreted the owner's comment as comparing being gay to being a drug addict. Her supervisor gave Jacinda the assignment of reading the book and writing a one-page essay about how it could improve her life.

Jacinda was offended by the book's characterization of being gay as "immoral behavior". She was also offended by other passages that mentioned masturbation. Additionally, the book's perspective on spiritual growth made her uncomfortable. Jacinda wrote a letter to her supervisor saying she was uncomfortable with the assignment because the book's message violated her beliefs and she requested that her assignment be changed to read another book. After she requested a different assignment, Jacinda's co-workers stopped talking to her and stopped asking her to join them at lunch. Shortly after that, Jacinda was fired on March 23, 2007. The company claimed that she was fired because the company's revenue was too low, but the company hired other people for the same job after they fired Jacinda.

Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007.

Michelle

Michelle is a Navajo transgender woman who was employed as a waitress in California. Michelle was not "out" as transgender to her employer or coworkers. After working for a month and a half, Michelle disclosed her transgender status to a coworker who then shared Michelle's personal information with their supervisor. One day, after learning about Michelle's transgender identity, the supervisor approached Michelle alone, grabbed her breast and said "I know what you are." Though Michelle was intimidated by her supervisor, she did not leave her job. Before this incident, the restaurant had accommodated Michelle's other obligations when completing the employee schedule. However, following the sexual harassment by her supervisor, the management team demanded that Michelle work full-time, or leave the job. Because Michelle could not work full-time, she was forced out of the job.

Source: Conversation between Jack Harrison, Task Force Policy Analyst and Michelle, 2012.

ENDA PROTECTS AMERICAN WORKERS

ENDA will help protect workers from discrimination in the workplace by prohibiting discrimination on the basis of sexual orientation or gender identity in the same way that Title VII of the Civil Rights Act prohibits discrimination on the basis of race, color, religion, sex, or national origin. ENDA provides employees with the same meaningful remedies that are available under title VII.

ENDA covers private employers with 15 or more employees, labor unions, employment agencies, and Federal, State, and local governments. The legislation exempts the Armed Forces, religious institutions, and employers with less than 15 employees. It makes it unlawful to fire, refuse to hire, or take any other action that would negatively impact a person's status as an employee based on that person's sexual orientation or gender identity. Additionally, it would prohibit discrimination against an employee as a result of the sexual orientation or gender identity of someone with whom the employee associates. Furthermore, ENDA would make illegal any discrimination against an individual because that person has opposed or spoken out about an unlawful employment practice.

The explicit protections in Federal statute for gender identity, and sexual orientation, which will be created by ENDA are crucial, despite recent rulings from courts and the EEOC that transgender people, as well as lesbian, gay, and bisexual people, are protected by the prohibition of sex discrimination in Title VII of the Civil Rights Act.[3]

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[3] *See, e.g., Macy* v. *Holder*, EEOC Appeal No. 0120120821, Agency No. ATF–2011–00751 (Apr. 20, 2012) (finding that discrimination based on gender identity, change of sex, and/or transgender status is cognizable under title VII; *Schroer* v. *Billington*, 577 F.Supp.2d 293 (2008) (D.C. 2008) (holding that transgender plaintiff was protected by title VII both due to sex stereotyping and because discrimination against a person who had changed gender was gender discrimination just as it was religious discrimination to discriminate against a person because they changed their religion); *Lopez* v. *River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp.

Continued

Decisions such as *Glenn* v. *Brumby* and *Macy* v. *Holder* correctly hold that transgender people are fully covered by the sex discrimination provisions of title VII.[4] This is true regardless of whether the discrimination occurred because the person is gender non-conforming, has transitioned gender, or identifies as transgender.[5] Other Federal cases such as *Centola* v. *Potter* and *Heller* v. *Columbia Edgewater Country Club*, and two non-binding decisions by the EEOC, have held that discrimination against lesbian, gay, and bisexual people also falls within the purview of sex discrimination laws.[6]

The protections created by ENDA in no way limit the protections that LGBT people have under title VII or other laws that prohibit sex discrimination. Federal courts and other bodies interpreting title VII should continue to apply that statute in a manner that recognizes that the prohibition of sex discrimination encompasses all types of discrimination related to a person's gender, including discrimination because a person does not conform to narrow gender stereotypes or is lesbian, gay, bisexual, or transgender. However, Congress needs to pass ENDA to ensure that all employers are on clear notice that Federal law prohibits discrimination on the basis of sexual orientation and gender identity. Without ENDA, employers are likely to be unaware of their potential liability under Federal law, and LGBT and gender non-conforming employees are likely unaware of their right to be free from discrimination on the job.

MOST AMERICANS ALREADY SUPPORT ENDA

The Employment Non-Discrimination Act is also consistent with the opinions of the American public. According to numerous surveys, substantial majorities of likely voters in the U.S. support an inclusive Federal employment non-discrimination law. In April 2011, A Center for American Progress (CAP) poll conducted by the Greenberg Quinlan Rosner Research Group of likely 2012 voters found that a striking 73 percent support protecting gay and transgender people from workplace discrimination. Further noteworthy, this support cuts across party affiliation with 81 percent of Democrats, 74 percent of independents, and 66 percent of Republicans supporting workplace nondiscrimination laws for LGBT people. The poll also found that 50 percent of respondents who feel "generally unfavorable" toward gay people supported workplace non-discrimination protections for gay and transgender people. Voters and their representatives in 16 States and more than 140 localities—areas comprising nearly 44 percent of the U.S. population—have already taken action by adopting legislation that protects lesbian, gay, bisexual and transgender workers from discrimination. However, coverage is inconsistent across the country, varying from State to State, and local ordinances are often under-enforced. ENDA is needed to expressly and uniformly prohibit workplace discrimination throughout the United States.

Businesses, too, have realized the importance of nondiscrimination policies that protect against discrimination based upon sexual orientation or gender identity. An impressive 86 percent of Fortune 500 companies have enacted non-discrimination policies inclusive of sexual orientation, and 50 percent have policies which include protection for gender identity.[7] As further evidence of the majority support of diverse workplaces, the 50 largest Federal contractors and 50 biggest Fortune 500 companies recently reported in a Williams Institute study that they have policies

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2d 653, 655–56 (S.D. Tex. 2008) (holding that title VII is violated when an employer discriminates against any employee, transsexual or not, because of their gender expression); *Prowel* v. *Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009) (denying summary judgment on a sex discrimination claim, explaining that evidence of sexual orientation harassment "does not vitiate the possibility that [the plaintiff] was also harassed for his failure to conform to gender stereotypes"); *Smith* v. *City of Salem*, 378 F.3d 566 (6th Cir. 2004) (holding that a transgender woman plaintiff fired from her job for expressing feminine gender characteristics at work could recover under title VII).

[4] *Glenn* v. *Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Macy*, Appeal No. 0120120821 (EEOC Apr. 20, 2012).

[5] *Macy*, Appeal No. 0120120821 (2012).

[6] *Centola* v. *Potter*, 183 F.Supp.2d 403 (D. Mass 2002) (finding that an employer cannot discriminate against an openly gay man or a man perceived to be gay based on a failure to conform to sexual stereotypes of how "real" men behave); *Heller* v. *Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002) (denying summary judgment on a title VII sex discrimination claim and stating that nothing in title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone); *Castello* v. *Postmaster General*, EEOC Appeal No. 0120111795, Agency No. 1G–701–0071–10 (Dec. 20, 2011); *Veretto* v. *Postmaster General*, EEOC Appeal No. 0120110873, Agency No. 4B–060–0130–10 (July 1, 2011).

[7] The Corporate Equality Index 2012: Rating American Workplaces on Gay, Lesbian, Bisexual and Transgender Equality. Human Rights Campaign Foundation, 2011. Available at *http://sites.hrc.org/documents/CorporateEqualityIndex_2012.pdf*.

against sexual orientation discrimination and said unequivocally that diversity is good for business.[8] Companies such as AT&T, Bank of America, Best Buy, Boeing, Coca-Cola, Dell, Ford Motor, Google, IBM, Kraft Foods, Marriott International, Microsoft, Monsanto, Pfizer, Procter & Gamble, and Target have all adopted non-discrimination policies that include sexual orientation and gender identity. Companies have adopted these workplace non-discrimination policies because they are motivated by the bottom line: hiring and retaining the best, most experienced person for the job makes good business sense; employees who do not have to fear discrimination are loyal and productive; and searching for and training replacement employees is expensive. Recently, the National Football League added a ban on discrimination based on sexual orientation to its collective bargaining agreement which was ratified by the league's players on August 4, 2011. This clear stance against LGBT employment discrimination by American corporations demonstrates the readiness of the country for the comprehensive protections of ENDA.

CONCLUSION

Employment discrimination affects all Americans, preventing them from meaningfully contributing their talents to our Nation's workforce. Rampant discrimination leaves LGBT Americans with the perilous choice of either hiding their LGBT identity in the workplace or risking discriminatory treatment and harassment by disclosing their LGBT identity.

The United States cannot afford to allow qualified people to be irrationally excluded from employment simply because of prejudice against their sexual orientation or gender identity. The competitiveness of the Nation in the world market depends on U.S. companies and government employers hiring and retaining the best qualified employees.

We urge Congress to support the Employment Non-Discrimination Act as a measured response to the problem of job discrimination and the subsequent dire consequences to American families. Our data from The National Transgender Discrimination Study affirms the reality and severity of employment discrimination for LGBT Americans and their families. Eliminating the toll that employment discrimination takes on individuals, families, and on society is a worthwhile governmental and financial goal.

Passing ENDA into law would reaffirm America's longtime commitment to the values of honest hard work and fair employment, assuring all Americans that what truly matters in the workplace are the merits of their work, and not the people they love or the gender they express.

In support of this goal, we respectfully ask that Chairman Harkin move S. 811, the Employment Non-Discrimination Act, to a committee vote and that the committee supports ENDA as the critical step toward securing fair workplace treatment for all Americans.

PREPARED STATEMENT OF THE TRANSGENDER LAW CENTER, MASEN DAVIS, EXECUTIVE DIRECTOR

Mr. Chairman, Vice-Chairman, and members of the committee, we thank Chairman Harkin and the committee for holding a hearing on the Employment Non-Discrimination Act (ENDA), S. 811. On behalf of the Transgender Law Center (TLC), we are writing to provide you with information showing why it is crucial that you support this critically important legislation.

TLC is a national non-profit, civil rights organization advocating for the rights of transgender and gender nonconforming people. Created in 2002 in response to the overwhelming discrimination that transgender people and our families face in nearly every area of life, TLC utilizes legal services, education, community organizing, and policy and media advocacy to overcome this discrimination and help ensure that every person can live safely and authentically, regardless of their gender identity or expression. We provide legal information and assistance to nearly 1,500 transgender and gender non-conforming people per year. We also provide advice and technical assistance to private attorneys representing transgender and gender nonconforming clients nationwide. Approximately 10–15 percent of the inquiries we receive are related to employment discrimination. We have also represented transgender people in prominent discrimination cases, including *Macy* v. *Holder*, in which the Equal Employment Opportunity Commission ruled in April of this year that transgender people are covered by the sex-discrimination prohibition of Title

[8] The Williams Institute: Economic Motives for Adopting LGBT-Related Workplace Policies, 2011.

VII of the Civil Rights Act of 1964.[1] Accordingly, TLC has extensive knowledge of the widespread pattern of discrimination against transgender and gender non-conforming workers.

Many times a week, we hear from a transgender or gender nonconforming person somewhere in the United States who has been fired, denied a job, or mistreated at work just because of their gender identity or expression. Despite existing protections under some State laws and under Federal sex discrimination laws like title VII, both employers and employees lack the basic knowledge that transgender people have legal protections from job discrimination. In the last year alone, Transgender Law Center assisted individuals in all types of jobs, including a transgender former police detective, Mia Macy, who was denied a job at the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives after she came out as transgender[2]; a transgender man in California who was fired a day after he inquired about whether his employer, a nationwide company, provided health care benefits that covered gender transition; a transgender woman who worked as a skilled maintenance worker for a school district and was constantly harassed by coworkers after she transitioned from male to female; and a transgender woman in Virginia who was let go after a customer made a negative comment about her gender.

In 2008, Transgender Law Center conducted the first statewide survey in California documenting the financial, employment, health, and housing experiences of transgender Californians. With data from nearly 650 respondents, we worked with a team of social scientists to create *The State of Transgender California: Results from the 2008 California Transgender Economic Health Survey*.[3] The outcomes are stark. *The State of Transgender California* confirms that transgender and gender non-conforming people experience overwhelming discrimination and marginalization in employment based on their gender identity. A copy of *The State of Transgender California* is attached, and the findings are discussed throughout this statement.

The protection that ENDA would provide is crucial to ensuring that transgender and gender non-conforming employees are able to work in an environment that is safe, respectful and professional, regardless of gender identity.

TRANSGENDER PEOPLE ARE WELL-QUALIFIED TO WORK IN A VARIETY OF INDUSTRIES, YET FACE SIGNIFICANT ECONOMIC BARRIERS

The State of Transgender California reveals that transgender people who responded to the survey have remarkably high education levels. **Respondents are almost twice as likely to hold a bachelor's degree as the general California population.** Ninety-four percent of the transgender respondents over the age of 25 hold a high school diploma or equivalent compared to 80 percent in California generally. Overall 46 percent of transgender people hold a Bachelor's degree or higher compared to 29 percent of the general California population.

Nonetheless, transgender people are disproportionately represented below the poverty line. According to the most recent State census, approximately 11.7 percent of people 18–64 years old in California live below the national poverty level of $10,400 for single adult households. Yet **1 in 4 transgender people in California earn wages below the national poverty level**. This disconcerting trend continues, even at higher education levels. The average income for all individuals with a Bachelor's degree residing in California is over $50,000. **The average yearly income for transgender respondents with a Bachelor's degree is below $30,000—40 percent less than the average college graduate in California.**

The State of Transgender California also found that respondents who are employed work in a variety of fields and occupations. Thirty-nine percent work in the private sector, 28 percent work in the non-profit sector, 16 percent work in government, and 16 percent are self-employed. Yet despite high education levels and experience in a broad range of fields, **less than half of respondents are currently employed full-time**. The overall unemployment rate for transgender persons was twice the statewide average for the period this survey was administered.

TRANSGENDER PEOPLE FACE A WIDESPREAD PATTERN OF DISCRIMINATION AND HARASSMENT IN EMPLOYMENT

Discrimination and harassment based on gender identity is a reality for transgender and gender non-conforming workers. According to *The State of Transgender California*, **two thirds of transgender Californians, or 67 percent**

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[1] *Macy* v. *Holder*, EEOC Appeal No. 0120120821, Agency No. ATF–2011–00751 (Apr. 20, 2012).

[2] *See Macy*, EEOC Appeal No. 0120120821 (2012).

[3] Available at *http://transgenderlawcenter.org/pdf/StateTransCA__report__2009Print.pdf*.

report some form of workplace harassment or discrimination directly related to their gender identity. This harassment and discrimination ranged from verbal harassment to unfair scrutiny or discipline to termination of employment. Almost half of the surveyed population reports that they experienced some loss of employment either directly as a result of their gender identity or as a possible result of their gender identity.

There was no difference between experiencing discrimination and type of employer. The widespread pattern of discrimination and harassment faced by transgender workers exists in private companies, in the non-profit sector, and in government.

DISCRIMINATION AGAINST TRANSGENDER EMPLOYEES IS UNDER-REPORTED

Despite widespread employment discrimination, **only 15 percent of transgender Californians who reported some form of discrimination or harassment went on to file a complaint.** California has explicit protections against workplace discrimination based on gender identity, and still reporting rates are shockingly low. One can assume that reporting rates in the many States without such protections are far lower. Without explicit Federal protections, State and local employees are not only vulnerable to discrimination, but are also less likely to speak out about it or make complaints out of fear of retaliation by the employer, and because they are not assured legal recourse for such discrimination or retaliation.

ENDA IS NECESSARY TO CLARIFY EMPLOYERS' OBLIGATIONS UNDER FEDERAL LAW

The explicit protections in Federal statute for gender identity and sexual orientation created by ENDA are crucial, despite recent rulings from courts and the EEOC that transgender people, as well as lesbian, gay, and bisexual people, are protected by the prohibition of sex discrimination in Title VII of the Civil Rights Act.[4]

Decisions such as that recently issued by the EEOC in the case brought by Transgender Law Center, *Macy* v. *Holder*, have correctly held that transgender people are fully covered by the sex discrimination provisions of title VII.[5] This is true regardless of whether the discrimination occurred because the person is gender nonconforming, has transitioned gender, or identifies as transgender.[6] Other Federal decisions such as *Centola* v. *Potter* and *Heller* v. *Columbia Edgewater Country Club*, and two non-binding decisions by the EEOC, have held that discrimination against lesbian, gay, and bisexual people also falls within the purview of sex discrimination laws.[7]

The protections created by ENDA in no way limit the protections that LGBT people have under title VII or other laws that prohibit sex discrimination. Federal courts and other bodies interpreting title VII should continue to apply that statute in a manner that recognizes that the prohibition of sex discrimination encompasses all types of discrimination related to a person's gender, including discrimination because a person does not conform to narrow gender stereotypes or is lesbian, gay, bisexual, or transgender. The passage of ENDA is necessary, however, to make sure

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[4] *See, e.g., Macy*, EEOC Appeal No. 0120120821 (2012) (finding that discrimination based on gender identity, change of sex, and/or transgender status is cognizable under title VII; *Schroer* v. *Billington*, 577 F.Supp.2d 293 (2008) (D.C. 2008) (holding that transgender plaintiff was protected by title VII both due to sex stereotyping and because discrimination against a person who had changed gender was gender discrimination just as it was religious discrimination to discriminate against a person because they changed their religion); *Lopez* v. *River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 655–56 (S.D. Tex. 2008) (holding that title VII is violated when an employer discriminates against any employee, transsexual or not, because of their gender expression); *Prowel* v. *Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009) (denying summary judgment on a sex discrimination claim, explaining that evidence of sexual orientation harassment "does not vitiate the possibility that [the plaintiff] was also harassed for his failure to conform to gender stereotypes"); *Smith* v. *City of Salem*, 378 F.3d 566 (6th Cir. 2004) (holding that a transgender woman plaintiff fired for her job for expressing feminine gender characteristics at work could recover under title VII).

[5] *Glenn* v. *Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Macy*, Appeal No. 0120120821 (Apr. 20, 2012).

[6] *Macy*, EEOC Appeal No. 0120120821 (2012).

[7] *Centola* v. *Potter*, 183 F.Supp.2d 403 (D. Mass 2002) (finding that an employer cannot discriminate against an openly gay man or a man perceived to be gay because of or based on a failure to conform to sexual stereotypes of how "real" men behave); *Heller* v. *Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002) (denying summary judgment on a title VII sex discrimination claim and stating that nothing in title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone); *Castello* v. *Postmaster General*, EEOC Appeal No. 0120111795, Agency No. 1G–701–0071–10 (Dec. 20, 2011); *Veretto* v. *Postmaster General*, EEOC Appeal No. 0120110873, Agency No. 4B–060–0130–10 (July 1, 2011).

that all employers are on clear notice that sexual orientation and gender identity are prohibited bases of discrimination. Without ENDA, employers are likely to be unaware of their potential liability under Federal law, and LGBT and gender nonconforming employees are likely unaware of their right to be free from discrimination on the job.

CONCLUSION

Allowing employers to make decisions about hiring, firing, promotions, and discipline based on a worker's identity goes against America's core value of equal opportunity. All too often, we see transgender Americans forced out of successful careers when they express their gender identity. Many transgender people fear and experience discrimination and therefore must either hide who they are, to the detriment of their health; leave jobs they love in order to transition without risking termination; or face rampant harassment and discrimination in their current workplace. Federal protection from discrimination and harassment based on gender identity would help liberate the transgender community from this stark reality. Such legislation would allow transgender Americans to continue contributing to our country's workforce without fear of being terminated simply because of who we are.

We urge the committee to recognize this issue of basic fairness. Transgender Americans deserve to be ourselves in a workplace where we are judged exclusively on our ability to do our jobs. Work is an integral part of our lives, of who we are, just like our gender. No American should be denied a job just because of their gender. In support of this goal, we respectfully ask that Chairman Harkin move S. 811, the Employment Non-Discrimination Act, to a committee vote and that the committee supports ENDA as the critical step toward securing fair workplace treatment for all Americans.

LETTERS OF SUPPORT

HUMAN RIGHTS CAMPAIGN®,
JUNE 12, 2012.

DEAR CHAIRMAN TOM HARKIN AND RANKING MEMBER MICHAEL ENZI: As members of the Business Coalition for Workplace Fairness, we represent America's leading businesses that have already adopted non-discrimination policies to protect our gay, lesbian, bisexual and transgender employees. We firmly believe that protecting employees from discrimination on the basis of sexual orientation and gender identity is consistent with good business practice regarding treatment of employees, clients, stakeholders, and the general public. For this reason, we wish to express our strong support for the Employment Non-Discrimination Act (H.R. 1397 & S. 811).

To make our workplace values clear and transparent to our employees, customers and investors, each of our businesses have already implemented a non-discrimination policy which is inclusive of sexual orientation and gender identity. This policy has been accepted broadly and we believe it has positively affected our bottom-line. Our philosophy and practice of valuing diversity encourages full and open participation by all employees. By treating all employees with fairness and respect we have been able to recruit and retain the best and brightest workers, thereby bringing a multitude of diverse opinions and perspectives to our organizations. In 2011, 86 percent of Fortune 500 companies provided employment protections on the basis of sexual orientation, and 50 percent provided employment protections on the basis of gender identity.

Federal non-discrimination protections for lesbian, gay, bisexual and transgender workers will benefit American business. Businesses that drive away talented and capable employees are certain to lose their competitive edge. Excluding any one of our Nation's employees from the basic right to work in a safe and welcoming environment will, in the end, impede our Nation's ability to compete in a global marketplace.

Thank you for this opportunity to share our views with you.

Sincerely,

Accenture Ltd., New York, NY; Alcoa Inc., New York, NY; American Institute of Architects, Washington, DC; Ameriprise Financial Inc., Minneapolis, MN; Amgen Inc., Thousand Oaks, CA; AMR Corp. (American Airlines), Fort Worth, TX; Bank of America Corp., Charlotte, NC; The Bank of New York Mellon Corp. (BNY Mellon), New York, NY; Barclays, New York, NY; BASF Corp., Florham Park, NJ; Bausch & Lomb Inc., Rochester, NY; Best Buy Co. Inc., Richfield, MN; Bingham McCutchen LLP, Boston, MA; BMC Software Inc., Houston, TX; Boehringer Ingelheim USA Corp., Ridgefield, CT; BP America Inc., Warrenville, IL; Bristol-

Myers Squibb Co., New York, NY; Caesars Entertainment Corp., Las Vegas, NV; Capital One Financial Corp., McLean, VA; Charles Schwab & Co., San Francisco, CA; Chevron Corp., San Ramon, CA; Choice Hotels International Inc., Silver Spring, MD; Chubb Corp., Warren, NJ; Cisco Systems Inc., San Jose, CA; Citigroup, New York, NY; Clear Channel Communications Inc., San Antonio, TX; Clorox Co., Oakland, CA; The Coca-Cola Co., Atlanta, GA; Corning Inc., Corning, NY;, Dell Inc., Round Rock, TX; Deloitte LLP, New York, NY; Deutsche Bank, New York, NY; Diageo North America, Norwalk, CT; Dow Chemical Co., Midland, MI; Eastman Kodak Co., Rochester, NY; Electronic Arts Inc., Redwood City, CA; Eli Lilly & Co., Indianapolis, IN; EMC Corp., Hopkinton, MA; Ernst & Young LLP, New York, NY; Gap Inc., San Francisco, CA; General Mills Inc., Minneapolis, MN; General Motors Corp., Detroit, MI; GlaxoSmithKline, Philadelphia, PA; Goldman Sachs Group Inc., New York, NY; Google Inc., Mountain View, CA; Hanover Direct Inc., Weehawken, NJ; Herman Miller Inc., Zeeland, MI; Hewlett-Packard Co., Palo Alto, CA; Hospira Inc., Lake Forest, IL; HSBC—North America, Prospect Heights, IL; Integrity Staffing Solutions Inc. Wilmington, DE; International Business Machines Corp., Armonk, NY; JPMorgan Chase & Co., New York, NY; Jenner & Block LLP, Chicago, IL; Kaiser Permanente, Oakland, CA; KeyCorp, Cleveland, OH; Kimpton Hotel & Restaurant Group, San Francisco, CA; KPMG LLP, New York, NY; Levi Strauss & Co., San Francisco, CA; Marriott International Inc., Bethesda, MD; Marsh & McLennan Companies Inc., New York, NY; Merck & Co. Inc., Whitehouse Station, NJ; Microsoft Corp., Redmond, WA; MillerCoors Brewing Co., Chicago, IL; Morgan Stanley, New York, NY; Motorola Inc., Schaumburg, IL; Nationwide, Columbus, OH; NCR Corp., Dayton, OH; The Nielsen Co., Schaumburg, IL; Nike Inc., Beaverton, OR; Orbitz Worldwide Inc., Chicago, IL; Oracle Corp., Redwood City, CA; Pfizer Inc., New York, NY; PricewaterhouseCoopers LLP, New York, NY; QUALCOMM Inc., San Diego, CA; RBC Dain Rauscher Inc., Minneapolis, MN; Replacements, Ltd., Greensboro, NC; Robins, Kaplan, Miller & Ciresi LLP, Minneapolis, MN; Ryder System Inc., Miami, FL; Sara Lee Corp., Downers Grove, IL; SUPERVALU Inc., Eden Prairie, MN; Teachers Insurance and Annuity Association—College Retirement Equities Fund, New York, NY; Texas Instruments Inc., Dallas, TX; Time Warner Inc., New York, NY; Travelers Companies Inc., St. Paul, MN; US Airways Group Inc., Tempe, AZ; WellPoint Inc., Indianapolis, IN; Wells Fargo & Co., San Francisco, CA; Whirlpool Corp., Benton Harbor, MI; Xerox Corp., Stamford, CT; Yahoo! Inc., Sunnyvale, CA.

INTERFAITH ALLIANCE,
WASHINGTON, DC 20005–4706,
June 12, 2012.

Hon. TOM HARKIN, *Chairman,*
Hon. MICHAEL ENZI, *Ranking Member,*
U.S. Senate,
Committee on Health, Education, Labor, and Pensions,
428 Senate Dirksen Office Building,
Washington, DC 20510.

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: Thank you for holding today's hearing on the bipartisan Employment Non-Discrimination Act (ENDA) (S. 811). I write to you today as the president of Interfaith Alliance to express strong support for this important legislation. As a national organization whose more than 185,000 members are committed to religious freedom, championing individual rights, and promoting policies that protect both religion and democracy, ENDA is a crucial part of our work protecting faith and freedom.

Protecting the religious freedom of all Americans is of our utmost concern. We also believe a vibrant democracy guarantees the protection of civil rights for everyone with no exceptions made because of an individual's sexual orientation or gender identity. It is for these reasons that Interfaith Alliance is working hard to get passed an ENDA that is both fully inclusive *and* contains a religious exemption provision to protect the constitutional rights of all.

Despite what opponents may contend, the truth is that ENDA would not create new or special rights, or violate the religious freedom of those whose religious beliefs condemn the LGBT community. Modeled after existing laws such as the Civil Rights Act of 1964 and the Americans with Disabilities Act, ENDA simply ensures that all Americans can enjoy the rights guaranteed to them by the Constitution. This legislation will simultaneously protect employers' First Amendment religious freedom rights, while ensuring employees are treated with the respect and equality that is mandated by our faiths and our American values.

As our Nation continues to face daily challenges that divide the American public, there is an increasing need to work together on issues of mutual concern. The Employment Non-Discrimination Act ensures liberty and it ensures equality. It abides by the values taught by the diverse faith traditions in this great Nation; and, perhaps most importantly, it ensures justice by guaranteeing the human dignity due to all Americans and provided for by the Constitution of the United States of America.

Passage of a fully inclusive ENDA with an appropriate religious exemption will be a victory for democracy and cause for celebration among all who value religious freedom. For more than a decade, Interfaith Alliance has worked to see ENDA become a reality—it's time to get this done.

Thank you again for devoting the committee's time to this important issue.

Sincerely,

REV. DR. C. WELTON GADDY,
President.

THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS,
WASHINGTON, DC 20006,
June 11, 2012.

Re: Cosponsor the Employment Non-Discrimination Act (ENDA)

DEAR MEMBER OF CONGRESS: The Leadership Conference on Civil and Human Rights and the undersigned organizations urge you to become a cosponsor of the Employment Non-Discrimination Act (ENDA). It is time for Congress to act on this crucial civil rights legislation.

Our organizations are dedicated to the principle that every worker should be judged solely on his or her merits. Hardworking Americans should not be kept from supporting their families and making a positive contribution to the economic life of our Nation because of characteristics that have no bearing whatsoever on their ability to do a job. Yet it remains legal in 29 States to fire or refuse to hire someone simply because of his or her sexual orientation, and in 34 States it is legal to do so solely based on an individual's gender identity. ENDA prohibits discrimination based on sexual orientation and gender identity in most workplaces. The time has long since come to end this injustice for gay, lesbian, bisexual and transgender Americans and pass ENDA.

America's corporate leaders support ENDA's fair-minded approach. Eighty-six percent of Fortune 500 companies have included sexual orientation protections in their workplace policies and more than 50 percent of them also prohibit discrimination based on gender identity. Corporate America is leading the way in workplace fairness.

Public support for ENDA is strong. A May 2008 poll conducted by Gallup found that 89 percent of Americans believe gay men and lesbians should have equal rights in the workplace. It is clear that Americans know that ENDA represents a measured and pragmatic response to unjust prejudice and discrimination.

We hope you will cosponsor and support this historic legislation. Please contact Rob Randhava, Senior Counsel at The Leadership Conference, at (202) 466–6058 if you have any questions.

Sincerely,

A. Philip Randolph Institute; AFL-CIO; Alliance for Retired Americans; American Association for Affirmative Action; American Association of People with Disabilities; American Association of University Women; American Civil Liberties Union; American Federation of Government Employees, AFL–CIO; American Federation of State, County and Municipal Employees; American Federation of Teachers; American Jewish Committee; American Psychological Association; American Speech—Language-Hearing Association; Americans for Democratic Acton, Inc.; Amnesty International USA; Anti-Defamation League; Asian American Justice Center; Association of Flight Attendants—CWA; Bazelon Center for Mental Health Law; B'nai B'rith International; Catholics for Equality; Center for American Progress Action Fund; Center for Women Policy Studies; CenterLink: The Community of LGBT Centers; COLAGE: People with a Lesbian, Gay, Bisexual, Transgender, or Queer Parent; Communications Workers of America; Disability Rights Education and Defense Fund; Disciples Justice Action Network; Equal Justice Society; Equality Matters; Family Equality Council; Freedom to Work Advocacy Fund; Friends Committee on National Legislation; Gay, Lesbian & Straight Education Network; GetEQUAL; Human Rights Campaign®; Immigration Equality Action Fund; International Foundation for Gender Education; International Union, United Automobile, Aerospace and Agricultural Im-

plement Workers of America (UAW); Japanese American Citizens League; Jewish Council for Public Affairs; Lambda Legal; Lawyers' Committee for Civil Rights Under Law; The Leadership Conference on Civil and Human Rights; League of United Latin American Citizens; Legal Aid Society-Employment Law Center; Legal Momentum; Log Cabin Republicans; Mexican American Legal Defense & Educational Fund (MALDEF); NAACP; NAACP Legal Defense & Educational Fund, Inc.; National Asian Pacific American Bar Association; National Association of Human Rights Workers; National Association of Social Workers; National Black Justice Coalition; National Center for Lesbian Rights; National Center for Transgender Equality; National Congress of Black Women, Inc.; National Council of Jewish Women; National Council of La Raza; National Disability Rights Network; National Education Association; National Employment Law Project; National Employment Lawyers Association; National Fair Housing Alliance; National Gay and Lesbian Task Force Action Fund; National Stonewall Democrats; National Workrights Institute; OCA; People For the American Way; PFLAG National (Parents, Families and Friends of Lesbians and Gays); Planned Parenthood Federation of America; Pride At Work, AFL–CIO; SEIU; Sexuality Information and Education Council of the U.S. (SIECUS); Southern Poverty Law Center; Transgender Law Center; Unid@s; Union for Reform Judaism; Unitarian Universalist Association of Congregations; United Church of Christ, Justice and Witness Ministries; United Electrical, Radio and Machine Workers of America; United Food and Commercial Workers, International (UFCW); United Methodist Church, General Board of Church and Society; United Steelworkers; Women Employed; Women of Reform Judaism; and Woodhull Sexual Freedom Alliance.

JUNE 12, 2012.

Re: Religious Organizations Letter in Support of the Employment Non-Discrimination Act (ENDA) (S. 811)

DEAR SENATOR: On behalf of our organizations, representing a diverse group of faith traditions and religious beliefs, we urge you to support S. 811, the Employment Non-Discrimination Act (ENDA). As a nation, we cannot tolerate arbitrary discrimination against millions of Americans just because of who they are. Lesbian, gay, bisexual and transgender (LGBT) people should be able to earn a living, provide for their families and contribute to our society without fear. ENDA is a measured, common sense solution that will ensure workers are judged on their merits, not sexual orientation or gender identity. We call on you to pass this important legislation without delay.

Many of our sacred texts speak to the importance and sacred nature of work—an opportunity to be co-creators with God—and demand in the strongest possible terms the protection of all workers as a matter of justice. Our faith leaders and congregations grapple with the difficulties of lost jobs every day, particularly in these difficult economic times. It is indefensible that, while sharing every American's concerns about the health of our economy, LGBT workers must also fear job security because of prejudice.

At the same time, as religious denominations and faith groups, we deeply value our guarantee to the freedoms of faith and conscience under the First Amendment. ENDA broadly exempts from its scope any religious organization, thereby ensuring that religious institutions will not be compelled to violate the religious precepts on which they are founded, whether or not we may agree with those precepts. In so doing, ENDA respects the protections for religious institutions afforded by the First Amendment and Title VII of the Civil Rights Act of 1964 while ensuring that lesbian, gay, bisexual and transgender people are protected from baseless discrimination in the workplace.

We urge Congress to swiftly pass the Employment Non-Discrimination Act (S. 811) and ensure that lesbian, gay, bisexual and transgender Americans have an equal opportunity to earn a living and provide for themselves and their families.

Sincerely,

African American Ministers in Action; Alliance of Baptists; American Conference of Cantors; American Friends Service Committee; American Jewish Committee; Anti-Defamation League; B'nai B'rith International; Brethren Mennonite Council for Lesbian, Gay, Bisexual and Transgender Interests; Central Conference of American Rabbis; DignityUSA; Disciples Justice Action Network (Disciples of Christ); The Episcopal Church; Fortunate Families; Friends Committee on National Legislation; GLAD Alliance (Disciples of Christ); Hindu American Foundation; Interfaith Alliance; Jewish Council for Public Affairs; Jewish Women International; Metropolitan Community Churches; Muslims for Progressive Values; National Black Justice Coa-

lition; National Council of the Churches of Christ in the U.S.A; National Council of Jewish Women; Presbyterian Church (U.S.A.) Office of Public Witness; Progressive Christians Uniting; Progressive Jewish Alliance; Rabbinical Assembly; Sisters of Mercy of the Americas; Institute Justice Team; Union for Reform Judaism; Unitarian Universalist Association of Congregations; United Church of Christ, Justice and Witness Ministries; United Church of Christ, Office for Lesbian, Gay, Bisexual and Transgender Ministries; United Church of Christ, Wider Church Ministries; United Methodist Church, General Board of Church and Society; United Synagogue of Conservative Judaism; Women of Reform Judaism.

RESPONSE TO QUESTIONS OF SENATOR CASEY BY KYLAR W. BROADUS

Question 1. Mr. Broadus, thank you for your testimony. Beyond the difficult challenges you experienced while still in the workplace, you have spoken eloquently about the psychological impact of unemployment. As a transgender individual who was driven out of your job by discriminatory practices, can you please speak further to the unique challenges you faced in the hunt for a new job?

Answer 1. Senator Casey thanks for your question. After building a career in the financial services industry for almost 8 years, I had to start looking in fields or areas that I hadn't considered. I was desperate to find anything! Prior to transition, I had been good at job hunting. After transition, job hunting was an extreme challenge because people judged me not on my qualifications but on their perceived bias against transgender people. In many cases, I couldn't even get my foot in the door. I was turned away from most jobs that I was qualified or even overqualified to do. I wouldn't get the interview because my records didn't match my name or gender marker after my transition. Or, I would get the interview but once they saw me or learned that I was transgender there would be no opening or I wasn't the right candidate for the job. I had no success in finding full-time employment but was able to obtain part-time employment.

I was so afraid during this time that I would never find a job again or have any kind of career again. It was pure survival. It was economically as well as emotionally traumatic to go through this period of unemployment. Even when I did begin employment, it wasn't near the level that I had been employed but provided insurance benefits and a steady paycheck. I still suffer from the vestiges of unemployment from that time period. I have never economically recovered and have just started to make yearly what I made at the corporation I worked for over 15 years ago before being pushed out. My student loan debt has quadrupled during this time and I have and continue to struggle to survive. As an out transgender American, my employment options are still extremely limited because I am judged for being transgender and not on the basis of my qualifications.

RESPONSE TO QUESTIONS OF SENATOR CASEY BY KENNETH CHARLES

Question 1. Mr. Charles, I was impressed to hear of the forward-thinking and inclusive human resources policies employed by General Mills. In your opinion, what obstacles exist currently for other companies to implement similar non-discrimination policies?

Answer 1. Senator Casey, thank you for that question. It appears that the greatest obstacle is a lack of commitment to providing equal protection. It's important to appreciate that companies that would be affected by ENDA passage routinely meet a number of Federal Government requirements to provide equal protection. ENDA execution would be incremental to those efforts. Employers would need to expand the training they are currently providing their employees and effectively communicate the new requirements and expectations. Our experience has been that it is easy to accomplish if you're committed to doing it. There are numerous resources, many at no cost, that can help an organization navigate the change.

RESPONSE TO QUESTIONS OF SENATOR FRANKEN BY CRAIG L. PARSHALL

MEMORANDUM

To: Senator Al Franken, c/o Senate Committee on Health, Education, Labor, and Pensions

From: Craig Parshall, Sr., V.P. & General Counsel, National Religious Broadcasters (NRB)

Date: July 24, 2012

Re: Hearing on S. 811, June 12, 2012, "Equality at Work—the Employment Non-Discrimination Act (ENDA)"

Following my testimony on June 12, 2012, before the Senate "HELP" Committee regarding the above, Senator Al Franken submitted a written question to me, for the record. I appreciate Senator Franken's interest in my testimony, and I will attempt to address his question in this Memorandum. As Senator Franken's question actually consists of several queries, I have divided them into their logical components and will address each of them.

Question 1. In your testimony, you assert that the religious exemption in ENDA will require that courts will be forced to determine whether sexual orientation and gender identity claims are more like claims of sex discrimination or religious discrimination. This seems to ignore the fact that the legislative language of ENDA states that the "Act shall not apply to [entities] exempt from the religious discrimination provisions of title VII," which means that if an entity cannot be sued for religious discrimination under title VII, it cannot be sued for sexual orientation or gender identity discrimination under ENDA.

Answer 1. In my testimony I pointed out that currently, title VII law, as uniformly interpreted by the courts, does *not* exempt religious employers from discrimination based on "sex." This is so, regardless of the religious exemption in title VII, which enables those employers to apply religious criteria regarding the "religion" of the employee, as courts have ruled that: "Title VII '*does not*' confer upon religious organizations the right to make those same decisions on the basis of . . . sex . . ." *Id.*, citing *Rayburn* v. *Gen'l Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985).[1]

Recent court decisions have also expanded the reach of the meaning of discrimination based on "sex" to include adverse employment decisions based on the "gender-identity" of the employee. *Smith* v. *City of Salem, OH*, 378 F.3d 566 (6th Cir. 2004); *Schwenk* v. *Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Rosa* v. *Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Glenn* v. *Brumby*, 663 F.3d 1312 (11th Cir. 2011). Further, on April 20, 2012, the Equal Employment Opportunity Commission (EEOC) rendered its decision in *Macy* v. *Holder*, Appeal No. 0120120821, officially recognizing "gender identity" discrimination claims by "transgender" individuals to qualify as "sex" discrimination under title VII. Added to these kinds of claims that can supersede the religious exemption of title VII are also claims based on sexual orientation. See: *Prowel* v. *Wise Business Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009): "Wise [the employer] cannot persuasively argue that because Prowel is homosexual, he is precluded from bringing a gender stereotyping claim" (the court submitting the claim of a homosexual for employment discrimination to a jury trial under existing title VII law based on "sex" discrimination).

Thus, if ENDA intends to fully incorporate the existing religious exemption under title VII, courts will invariably have to grapple with the fact that the language chosen appears to create an inherent *Catch–22*: religious employers are presumably exempted under ENDA from employee claims based on sexual orientation and gender identity, by utilizing the very religious exemption scheme under title VII, which has in essence been held *not* to provide protection for religious employers against sexual orientation and gender identity claims under existing law.

The only way for a future court to extricate itself from this dilemma is to recognize that ENDA's religious exemption creates a statutory ambiguity (if not an anomaly), forcing the court to attempt to harmonize conflicting precedent and perhaps to decipher congressional intent, a journey that invariably involves imprecise, and sometimes damaging forms of judicial creativity.

The supporters of ENDA counter, as you have, Senator, by suggesting that ENDA's religious exemption is "much broader" than that in title VII. This leads to your next point below, and my response.

Question 2. In fact, the ENDA religious exemption is much broader than the exemption granted under title VII, in which courts have historically conducted an inquiry that examines the religious nature of the institution, and whether their mission and teachings conflict with the requirements of the law. Even if one were to accept your reading of the religious exemption, can you explain why the court's inquiry into whether an entity were exempt from ENDA would be so different from the inquiries that they've been making for decades in enforcing title VII?

Answer 2. In my testimony, I indicated that title VII contains two basic components, both of which must be met in order for a religious organization to qualify for

[1] The sole exception is alleged sex discrimination in choosing or firing pastors, priests, rabbis, and other heads of religious organizations under the "ministerial exception." *Hosanna-Tabor Evangelical Lutheran Church and School* v. *Equal Employment Opportunity Commission et al.*, __U.S.__, 132 S. Ct. 694, 710 (2012).

exemption: (1) The first has to do with the religious structure of the employer as a "religious corporation . . .", etc. (2) The second has to do with the employer's objections to the religion of the employee and the employer's decision to make an adverse employment decision based on that factor. I testified that, in my opinion, ENDA's religious exemption, by incorporating title VII's religious exemption, has incorporated both (1) and (2), thus creating, at a minimum, a lack of critical clarity, if not dangerous ambiguity when applied to sexual orientation and gender identity claims.

In the same hearing, Samuel Bagenstos, Professor of Law, University of Michigan Law School, called as a witness in support of ENDA, indicated his agreement with my analysis of the two elements necessary for *any religious organization* to obtain an exemption under title VII. However, Professor Bagenstos went on to disagree with my statement that ENDA's religious exemption incorporates both elements (1) and (2) of title VII; he concluded, to the contrary, that ENDA's religious exemption only incorporates factor (1) relating to the religious identity of the employer. However, the sole basis for such an argument is an inference that this result is commanded by a fair reading of the language of ENDA's section 6, which states that the Act would not apply to a religious "corporation . . .", etc. "that is exempt from the *religious discrimination provisions* of title VII . . ." . But what are the "religious discrimination provisions of title VII?" They are both elements (1) and (2), as outlined in my testimony.

You have asked, Senator Franken, why I believe the court inquiries into section 6 of ENDA would be "so different" from past judicial analysis of the religious exemption of title VII. The answer to that, first, is that courts would be faced with the *Catch–22* that I mentioned above, deciding whether just factor (1) or both (1) and (2) are included in ENDA. Second, the courts would be faced with the fact that prior decisions (several of which are listed in this Memorandum) have already expanded the natural and reasonable reading of title VII's prohibition against discrimination because of "sex" to now include discrimination on the basis of sexual orientation and gender identity—categories that, as a form of "sex" discrimination, the courts have uniformly ruled can be protected through legal claims which trump the religious exemption language of title VII in all cases except for adverse employment actions involving a pastor, priest, rabbi or other similar religious leadership position.

Last, title VII's religious exemption language is itself fraught with interpretative problems. Unfortunately, Congress "did not define what constitutes a religious organization—'a religious corporation, association, educational institution, or society'" under title VII. *Spencer* v. *World Vision, Inc.*, 570 F. Supp. 2d 1279, 1283 (W.D. Wash. 2008). As a result, "courts conduct a factual inquiry and weigh '[a]ll significant religious and secular characteristics . . .'" *Id*. (citations omitted). This has led to numerous decisions depriving religious employers of fundamental liberties: *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F. 2d 610 (9th Cir. 1988) (no exemption for a small, closely held manufacturing shop whose owner had a clearly Christian world view and wanted it to permeate the work place); *Fike* v. *United Methodist Children's Home of Virginia, Inc.*, 547 F. Supp. 286 (E.D. Va. 1982) (A Methodist orphan's home dedicated to instilling in orphaned children Christian beliefs was held *not* to be qualified as a "religious corporation . . .", etc. when it sought to return to its original spiritual mission following a temporary period of more secular leadership); *EEOC* v. *Kamehameha School/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993) (private Protestant religious school was denied title VII religious exemption even though it had numerous religious characteristics and activities); *Pime* v. *Loyola University of Chicago*, 585 F. Supp. 435 (N.D. Ill. 1984) (Catholic college held not to be entitled to religious exemption relating to its preference for Jesuit professors over a Jewish professor), reversed on other grounds at 803 F.2d 351 (7th Cir. 1986) (where Judge Posner noted in his concurrence that, regarding the religious exemption issue, "the statute itself does not answer it" and "the legislative history . . . is inconclusive" *Id*. at 357).

This sad parade of bad decisions has been reinforced recently by the EEOC, which filed its own action last month in *Equal Employment Opportunity Commission* v. *Voss Electric Company*, *d/b/a Voss Lighting*, U.S. District Court for the Northern District of Oklahoma, Case No. 12–CV–330–JHP–FHM. In the complaint, page 2, paragraph 6. B., the EEOC alleges that "Voss Lighting generally considers itself and its employees to be Christian." Press reports indicate that the company was founded by a Christian man who wanted to incorporate faith-based principles in his workplace, and currently the Web site of the company spells out that Christian mission explicitly. However, because the company discussed religious subjects with a prospective employee during an employment interview, and the person was ultimately not hired, the EEOC is suing this company and asking the court for a permanent injunction against the company, enjoining it from carrying out its religious mission,

and also asking the court to assess punitive damages against the company, a remedy that could well devastate its ability to continue.

In summary, the lack of precision in title VII's own religious exemption language, the decisions by courts, and the EEOC elevating sexual orientation and gender identity rights and at the same time lowering the protection afforded to religious employers under title VII, together with the interpretative dilemma created by ENDA's section 6, which I have outlined above, all lead me to believe that ENDA would not offer adequate or constitutional protection for religious employers.

[Whereupon, at 11:35 a.m., the hearing was adjourned.]